85-712

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-

JOHN E. KOERNER & CO., INC.,
AND IMPERIAL PRODUCTS CORP.,
Petitioners,

v.

PLAINTIFF CLASS REPRESENTATIVES AND
THE PLAINTIFF CLASS
Respondents,

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
(MDL 414)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was there a denial of due process in a nationwide antitrust class action consisting of approximately thirty-five thousand class members where the district court approved a settlement of some $12,750,000.00 and there exist: 1) unresolved allegations of "collusive" settlements; 2) direct court participation in settlement negotiations; 3) "ex parte" communications with the court; 4) critical pleadings sent to and considered by the court do not appear on the docket and are absent from the record; 5) the court involved in settlement discussions had stayed all merits discovery; and 6) objectors to the settlement were not permitted requested discovery on the fairness of the settlement and were denied an evidentiary hearing on the fairness and adequacy of the settlement?

2. Are the standards ennunciated by this Court in Protective Committee for Independent Stockholders of TMT Ferry, Inc. v. Anderson, 390 U.S.

414 (1969) applicable to proffered settlements in national antitrust class actions, and, if not, should this Court now ennunciate appropriate settlement guidelines?

3. Where the Manual for Complex Litigation ennunciates minimum standards for effectuating and evaluating settlements, was it a clear abuse of discretion for the district court and the court of appeals to sanction departures from those standards by the district court and counsel?

4. Was it a denial of due process and an abuse of discretion for the district court to entertain settlement proposals from other than counsel authorized to negotiate settlement by the Committee established by Pre-Trial Order?

5. Where the record below reflects that competing "class counsel" negotiated competitive settlements in ever-decreasing amounts, did the denial of discovery and evidentiary inquiry by the district court, approved by the Court of Appeals for the Third Circuit, constitute such a departure

from the standards of other circuits as to constitute a conflict between circuits?

6. Is a notice to a putative settlement class adequate notice under Rule 23, Federal Rules of Civil Procedure, when the notice fails to inform class members that there is objection to the proffered settlement by one of the counsel appointed by the district court?

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LIST OF ALL PARTIES TO PROCEEDINGS BELOW

Adeline Bake Shops, Inc.
ADM, Archer-Daniels-Midland, Corn Sweetners Div.
American Maize Products Co.
Amstar Corp.
Anheuser-Busch, Inc.
Ardent Farms Dist. Co.
Bear Stewart, Inc.
Bodines, Inc.
Cargill, Inc.
Corn Refiners Association
Corn Sweetners, Inc.
CPC International
Consolidated Packaging Corp.
Cumberland Farms of Connecticut, Inc.
Cumberland Farms of New Jersey, Inc.
Eastern Candy
Esco Foods, Inc.
Falstaff Brewing Corp.
Federal Bake Shops, Inc.
Finklestein's Farms
Food Fair, Inc.
Golden Quality Ice Cream Co.
Grain Processing Corp.
Health Care Industries, Inc.
G. Heilman Brewing Co.
Hubinger Company
Imperial Products, Inc.
International Dairy Queen, Inc.
John E. Koerner & Co., Inc.
Kalva Corporation
Kelco Industries
Keystone Co.
Korbro Oil Co., Inc.
Land O-Lakes
Marstan Industries, Inc.
Nabisco Brands, Inc.
National Starch & Chemical Corp.
Pan O'Gold Baking Co., Inc.
Pearl Brewing Co.
Penick & Ford, Ltd.
Plantation Confection Co., Inc.

Quaker Oats
Sanitary Bakery, Inc.
Sethness Greenleaf, Inc.
A.E. Staley Manufacturing Co.
Standard Brands
Stokley-Van Camp, Inc.
Superior Beverage Co., Inc.
Tropical Preserving Co.
United A.G. Cooperative
Virnelson Bakery, Inc.
White Oak Ice Cream, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners, John E. Koerner & Co., Inc. and Imperial Products Corp., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on August 26, 1985.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals affirming approval of the challenged settlements [App. A, interlineating the September 12, 1985 amendment] appears in a table of cases, 772 F.2d 894 (3d Cir. 1985). The two opinions of the district court are also unreported [App. B and C]. The district court's jugdment is Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on August 26, 1985 and amended on September 12, 1985. No petition for rehearing was filed. A stay of the mandate was granted through October 21, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GOVERNING RULES AND STANDARDS INVOLVED IN THE CASE

The Federal Rule of Civil Procedure involved is Rule 23(c)(1-2), 23(d), and 23(e) [App. F]. This case also involves the Manual for Complex Litigation, § 1.46, Criteria and Procedures for Approving Class Action Settlements [App. G].

STATEMENT OF THE CASE

A listing and description of court and principal participating counsel appears as Appendix H. Hereinafter and in the Record Synopsis [App. I], docket entries in the district court are referred to with the prefix "D", appendix entries in the Court of Appeals with the prefix "A".

The Federal Trade Commission obtained a consent order in 1950 against a number of corn wet millers including seven of the defendants in these actions. Trade Reg. Rep. (CCH) (1948-52 Trans. Binder) ¶¶ 14,531, 14,591, 14,396, and 14,204. That order prohibited, inter alia, price fixing, exchange of price information and other activities with respect to certain corn derivatives.

On December 7, 1979, the United States filed a civil contempt action in the Northern District of

California against eight defendant signatories to this order. Trade Regulation Reporter (CCH) ¶ 21,631. Some thirty-four private actions, alleging price fixing and other violations of the antitrust laws against twelve defendants, were thereafter filed in various jurisdictions and subsequently transferred as M.D.L. 414 to the District of New Jersey. In re Corn Derivatives Antitrust Litigation, 486 F.Supp. 929 (J.P.M.L. 1980).

The actions were first assigned to H. Curtis Meanor, then to Clarkson S. Fisher, who entered Pre-Trial Order No. 1, a comprehensive order of coordination, on July 2, 1980 and later recused himself. The cases were then reassigned to Judge Meanor and, upon his leaving the bench in February, 1983, were assigned to Dickinson R. Debevoise.

The pending government actions were settled, again by a consent decree, in June of 1982.

The defendants filed and subsequently reurged motions to dismiss the instant cases under Fed. R. Civ. Proc. 11. The motions were not finally denied until two years thereafter. In the interim, defendants successfully resisted all discovery

attempts. Merits discovery was stayed by order.

Pre-Trial Order No. 1 set up a structure to efficiently handle the case and, inter alia, appointed certain attorneys to be members of the Plaintiffs' Steering Committee. The Plaintiffs' Steering Committee appointed an Executive Committee "charged with the responsibility to pursue all settlement matters." Named members were "Guido Saveri, John Cochrane, Perry Goldberg, Joel Meredith, Robert Skirnich, and Arthur J. Sills as Ex-Officio Member." [A-137-38.] "At no time was either Mr. [Harold] Kohn, Mr. [David] Berger, or Mr. [William] Garrigle authorized by the Steering Committee or the Executive Committee to conduct any settlement negotiations on behalf of the Plaintiffs' Class." [Saveri Affidavit, A-136.]

At some time as yet not established in the record, Messrs. Kohn/Berger initiated secret negotiations with Messrs. McInerney/Joslyn, counsel for CPC, the purpose of which was to settle all claims against CPC on a class-wide basis [A-372].

In "Memorandum with Respect to Settlement Negotiations," dated May 17, 1982, marked

"CONFIDENTIAL - FILED UNDER SEAL", and not appearing on the docket [A-266-279], Messrs Kohn/Berger state that "Contemporaneously with the CPC negotiations, we were also discussing settlement with Standard Brands." [A-269.] Thereafter, according to this memorandum [A-271], they entered negotiations with Penick & Ford.

The announcement by Kohn/Berger of a 4.5 million dollar CPC settlement triggered a race to the courthouse by competing groups of lawyers with proportionally smaller settlements, less and less favorable to the class. These later settlements were so disproportionate that CPC, the first settling defendant, filed an ultimately successful motion to discount its settlement by $700,000.00 to bring its settlement more in line with the later, discounted settlements. Pleadings in connection with this motion were sent ex parte to the district court and do not appear in the record or on the docket. CPC obtained this relief by agreement with the "majority plaintiffs." [A-431.]

On April 12, 1983, a preliminary hearing re settlements was held before newly-assigned Judge

Debevoise, who stated: [A-431.]

> When I took over this case from Judge Meanor, it seemed that a settlement had been substantially agreed upon by a major portion of the plaintiffs and the defendants.
>
> The settlement was in a state of flux due to CPC seeking a revision of its -- terms of its settlement, and that apparently has been resolved by agreement between CPC and the various majority plaintiffs, which puts other settlements in a state of flux as others seek similar, or what they perceive to be similar accomodations which CPC achieved.

At that hearing, objections were raised on behalf of various plaintiffs to the settlements and to the sending out of notice inadequate to properly advise the class. On April 21, 1983, the court approved the form of notice that was sent to the class [App. E]. This notice did not state that there was opposition by a member of the Plaintiffs Executive Committee, that the CPC settlement had been discounted, nor any history of the controversial settlement negotiations.

Upon receipt of notice, petitioners filed notice of appearance and appeared at the June 30, 1983 hearing to raise, with others, timely objection to the proffered settlements. The motions of petitioners for discovery concerning the

settlements and for an evidentiary hearing were denied. Several key pleadings, not docketed, were missing from the record as made available to petitioners. On August 17, 1983, after a hearing limited to argument, the district court approved the settlements and read reasons into the record [App. CJ. Judgment was entered on September 7, 1983. [App. DJ. A timely appeal was taken.

Oral argument in the Court of Appeals on June 12, 1984 was restricted solely to a disqualification motion against the objecting member of the Plaintiffs' Executive Committee. Issuance of the mandate after the 11/15/84 order of disqualification but prior to disposition on the merits was revoked by Judge Aldisert. Disposition on the merits, again without oral argument, was set on 8/23/85. The unreported memorandum opinion was rendered on 8/26/85 and amended on 9/12/85.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Conflict with the Due Process Requirement that Objectors to a Class Settlement Be Permitted the Opportunity to Make a Record Through Discovery, Presentation of Evidence, and Cross-Examination and Conflict with the Standards Set by This Court and by the Second, Sixth, and Seventh Circuit Courts of Appeal.

Despite the utility of the position of objector to the court, Developments - Class Actions, 89 Harv.L.Rev. 1318, 1536 (1976) ["Developments"], the treatment of objectors in this litigation reflects the unenviable role stated by Haudek, The Settlement and Dismissal of Stockholders' Actions -- part II: The Settlement, 23 Sw.L.J. 769, 803, 805 (1969) ["Haudek"], particularly the "struggle" against the now "united front of the proponents," and against the "court's natural tendency to favor the compromise."

Objectors asked to present evidence at the settlement hearings, for discovery [Developments, 1568, Haudek, 766], and for additional time when efforts to obtain FTC and Grand Jury material were beginning to bear fruit [Id., 805]. The right to present evidence by cross-examination [objector's absolute right, id.], discovery, even questions to be posed by the court were denied [Id., 804]. Both hearings took less than a morning. No evidence was offered at either. "Argument of counsel" was the order of the day, despite the indispensibility of evidence as a requisite to the settlement decision

1984-2 Trade Cases (CCH) ¶ 66,143 at 66,421.

In Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 437 (1968), the proponents' contention that the "record contains 'an abundance of pleadings and allegations' respecting them" was insufficient as "the court needs facts, not allegations." Refusal of the trial judge to consider certain evidence was an "error" which "infected" its conclusions. "Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations." [Id., 444.] The trial court showed itself "hostile" to inquiries directed at the value of the matters being compromised [Id., 449] and "shut its eyes to these important developments and in so doing ignored a cardinal principle of proper evaluation." [Id., 453.]

Actual evidentiary hearings conducted by objectors with a fair chance to make a record often lead to at least preliminary disapproval of a proposed settlement. Norman v. McKee, 290 F.Supp. 29 (N.D. Cal. 1968), aff'd 431 F.2d 769 (9th Cir. 1970); Liebman v. J.W. Petersen Coal & Oil Co., 73

F.R.D. 531, 534 (N.D. Ill. 1973).

Substantial factual matters were here in dispute. Discovery and an evidentiary hearing [here specifically and repeatedly requested and denied] was, even with no more than the opportunity for cross-examination, a matter of due process.

2. The Decisions Below Constitute Numerous Departures from the Minimum Standards Ennunciated by the Manual for Complex Litigation for Arriving at and Evaluating Class Settlements, Thus Conflicting with Its Own Decisions and that of the Second, Fifth, and Seventh Circuit Courts of Appeal.

Although the burden is on proponents of the settlements to show that each settlement is fair and reasonable, Manual [App. 5g], and that each settlement meets all of the standards set by the Manual, Haudek at 792; Liebman, 73 F.R.D. at 534; General Motors, 594 F.2d at 1132, n. 44, the district court reached factual conclusions that the settlements were "not collusive nor vitiated by any divide and conquer strategy of the defendants" [App. 18c] without requiring clear and convincing evidence from the proponents alleged to have improperly negotiated them [Id. at 1127, n. 30].

Comparison of the Manual with the course of

proceedings below demonstrates serious departures:

(1) At wnat stage in the proceedings was the proposed settlement achieved?

The trial court characterized this case as at an "early stage of the proceedings." [App. 30c.] This fact raises "suspicions . . . because it may indicate collusion, . . ." Developments, 1569 n. 188; See, Girsh, 521 F.2d at 155; General Motors, 594 F.2d at 1128.

(2) Has there been any devlopment of the facts through discovery or otherwise on which estimates of the probability of liability and the range of possible damages can be made?

The effect of the initial merits discovery stay obtained by the defendants was to prevent "the plaintiffs from being more discriminating in their settlement negotiations." Susman, Prosecuting the Antitrust Action, 49 Antitrust L.J. 1513, 1514 (1980). The CPC settlement was "negotiated in complete ignorance of the pertinent facts." Haudek, 773. No settlement has other than been "blindly reached in . . . a haphazard fashion." [Id.] This factor alone required preliminary disapproval of all settlements [Id., Haudek, 794]. For government-obtained documents not to be reviewed by the

settlement proponents is unprecedented. State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710, 745 (S.D. N.Y. 1970); City of Detroit v. Grinnell Corporation, 495 F.2d 448, 464 (2d Cir. 1974); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977); In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 202 (5th Cir. 1981); Susman, 1521.

Lack of responsiveness of defendants, as here, to discovery is a detriment to approval of settlements. General Motors, 594 F.2d at 1128, n. 35. While there is little difference between formal and informal discovery, here proponents failed to provide anything other than the statement that, after reviewing certain documents and interviewing certain witnesses, they believed that the settlements were all fair. No fruits of discovery were provided to the trial judge, undoubtedly because "The deposition evidence is scant and unsatisfactory; the document material is surface stuff." Weiss, 55 F.R.D. at 171.

While permitting objectors further merits discovery does not "prophesy that inculpatory

material exists, but at least such proof should be sought." Weiss, 55 F.R.D. at 171.

(3) Can the proponents of the settlement submit data to establish at least preliminarily the reasonableness of the proposed settlement?

"The cardinal task of the court, however, is to weigh the likelihood of recovery in the action against the benefits of the compromise," Haudek, 793, 776, an attempt to "define the zone of acceptability." [Developments, 1573.] This record contains no economic data or other evidence submitted by proponents of the settlements to demonstrate their reasonableness. Only objectors prepared estimates of potential damages in the event of successful litigation. The district court was unable to provide any such comparison [App. 15c] either individually or in the aggregate. [Corrugated Containers, 643 F.2d at 218.] To this complaint of objectors, the court of appeals found "some substance. . . ." [App.3-4a.] Erroneous, however, was its conclusion that because of the Government case and the Dimmit case [Dimmitt Agri. Business Inds., Inc. v. CPC International, Inc., 679 F.2d 516 (5th Cir. 1982), cert. denied, ___

U.S. ___ (1983)], "any meaningful comparison was ethereal at best." See Malchman, 1984-2 Trade Cases at 66,143 "[T]oo many important questions were left open." Compare disapproval in General Motors, 594 F.2d at 1128, n. 35-36; TMT, 390 U.S. at 424.

Contrast the district court's opinion [App. 18-19c] with Percodani v. Riker-Maxson Corporation, 50 F.R.D. 473, 477 (S.D.N.Y. 1970) and Liebman v. Petersen Coal & Oil Co., 1974 Trade Cases (CCH) ¶ 75,117 at 96,975 (N.D. Ill. 1974) [after first settlements turned down, proponents conducted extensive discovery and new settlements were approved]. See Corrugated Container, 643 F.2d at 212. That no "more money could have been or could now be obtained from the defendants. . . ." [Compare App. 19c] is insufficient since "there is no reason to approve an otherwise inadequate settlement solely because it was the best offer defendants were willing to make." [Id. at 215.]

(4) Who were the negotiating parties and to what extent were they authorized to proceed with the settlement of their class' claims and possibly those of other classes?

This case was orphaned by Judge Fisher's recusal after he had approved appointment of lead

counsel. Like an affluent but difficult child shunted to a series of pre-occupied and less-than-sympathetic foster parents, this case suffered from judicial neglect which permitted an "internecine" squabble to develop between competing class attorneys, persons supposedly fiduciaries and guardians, "vying" for the prestige and rewards of appointment of lead counsel [Ace Heating & Plumbing Company v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971)]. The result was the "undesireable, premature, unauthorized settlement negotiations" reprobated by the Manual [App. 9g]. In direct contradiction, negotiation of the precedent-setting CPC settlement was not "conducted by counsel representing the class in the litigation." [Id.]

"Private negotiations of class action issues raise a particularly great danger of inadequate represention. . ." [Developments, 1537.] Although Judge Fisher wisely appointed counsel [A-71] to take charge of the prosecution of the action [Haudek at 767, 769, Grinnell, 495 F.2d at 465; Ace, 453 F.2d at 33; Marshall, 550 F.2d 1173; Corrugated Container, 643 F.2d at 208], the

mischief foreseen by Haudek, 769 occurred in that CPC was permitted to pick the person they considered "their 'softest' adversary for the negotiation of a cheap compromise." That this person would be Harold Kohn had been forecast by the authorities considering this issue subsequent to the publicity given Kohn's actions in Wolfram, The Antibiotics Class Actions, 1976 A.B.Found. Res. J. 251, 264 (1976); General Motors, 594 F.2d at 1125 n. 26; Developments at 1558, n. 117.

Mr. Kohn's situation as a non-official class representative was described in Ace, 453 F.2d at 33 as being "under strong pressure to conform to the defendants' wishes." [Quoted in Manual, App. 9-10g.] Kohn/Berger failed to seek "the approval of the judge to negotiate" and did not "keep the settlement process open to all plaintiffs' counsel." Susman, 1524. General Motors, 594 F.2d at 1115, 1131 is strikingly similar. The initial CPC "settlement negotiations with less than all class counsel weaken[ed] the class' tactical position . . ." [Id. at 1125.] The language used by the district court in describing the "internecine

conflicts" of the differing factions of proponents' counsel "vying" for recognition [App. 17c] is drawn directly from Grinnell, 495 F.2d at 465.

Judge Debevoise found himself faced with the obligation, endangered by his predecessor's delay and judicial participation in later settlements and the CPC settlement reduction [App. 18c] of assuring himself "the class has been adequately represented in settlement talks," [Developments, 1537]. The overwhelming bias in favor of approval of settlements [Haudek, 793] and lack of objector discovery made this "an impossible task" since

> all the active litigants will have an interest in obtaining court approval for their settlement, and may be unwilling -- or unable -- to engage in adversary proceedings which could expose deficiencies in the agreement and the process which produced it.

The policy to be observed [Siegel v. Realty Equities Corp. of N.Y., 1973 Transfer Binder Fed. Sec. L. Rep. (CCH) ¶ 94,102 (S.D.N.Y. 1973) at 94,445] is "the protection of all members of the class from a collusive or improvident settlement." Contrast the description of the case in Siegel as "strenuous and well fought," and of the activities of plaintiffs' counsel, who ". . . represented the

class well in a long and arduous battle." See, General Motors, 594 F.2d at 1124; Saylor, 456 F.2d at 904, discussing the qualities, vel non, in proponents' counsel of "thoroughness" and "disinterested judgment."

"[S]earching judicial examination of the circumstances surrounding and the matters discussed during the settlement negotiations" was warranted before acceptance of the proposed settlement for possible approval. General Motors, 594 F.2d at 1141.

The facts available to the newly-assigned district court did not adequately support that court's conclusion that the "seemingly irregular conduct of the negotiations did not prejudice the interests of the class." [Compare Developments at 1574.] For instance, the complete reversal, to support of settlements they formerly challenged [A-478-79, 848-49], by both Kohn/Berger [Standard Brands] and Saveri [CPC] is an indicia of inadequate representation of the class and evidence of a possible sell-out. [Developments, 1575.]

The General Motors court quoted Haudek at 771, as to the effect of a settlement infected by

irregular negotiations [594 F.2d at 1125, n. 24]:

> 24. The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiation [attorney] possessed better information or been animated by undivided loyality to the cause of the class. The court can reject a settlement that is inadequate, it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.

A claim of exercise of discretion by the trial court is insufficient to protect a settlement which is claimed to be tainted by collusive negotiations "no matter how acceptable it may otherwise appear." Haudek, 770. General Motors, 594 F.2d at 114: "[T]he the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party who was in a conflict position", Corrugated Container, 643 F.2d at 211, n. 25, even if "it was the best offer defendants were willing to make." [Id. at 215, see also General Motors, 594 F.2d at 1127, citing Haudek, 770.]

(5) Did all counsel for all parties participate in the negotiations and, if not, what are the views of the non-participating parties and counsel.

Unauthorized settlement negotiations were begun with CPC, Standard Brands, and other defendants by Kohn/Berger. After announcement of the CPC settlement, the Saveri group settled with Standard Brands for a lesser sum than the preliminininary Kohn/Berger agreement. Later settlements were so anomolous [App. 18-19c] that CPC successfully obtained a $700,000 reduction in its previously agreed settlement. The vividly-stated views of all of these attorneys are synopsized at Appendix I, 22-53i.

The continuing participation of Judges Meanor and Debevoise in negotiation of settlements rather than investigating the serious charges made by the proponents of the settlements similarly detracts from the regularity of the negotiating process and may have predjudiced the court's "final assessment" of the settlements [Developments, 1560].

At the preliminary settlement hearing, the court reviewed the opposition of John A. Cochrane, a member of both the Plaintiffs' Steering Committee and the Plaintiffs' Executive Committee [App.4-7b], whose "business judgment was entitled to great weight," Liebman, 73 F.R.D. at 534. He did not

confront the evidence of collusion, conflict of interest, and lack of discovery, rather Judge Debevoise was "not persuaded" that the "opinions expressed by various plaintiffs' attorneys in the past reflect their views now." [App. 7b.]

Prior to initial notification of the class, a "tentative" settlement class was formed in direct contravention of the Manual [App. 10g]. "[T]entative classes for the purposes of settlement . . . should not be formed." The Manual explanation [Id., 10-13g], quotes Wrigt & Miller on the "possibility of collusion" [Id., 12g], and concludes [Id.] that "The scope of such rights [of the class] cannot be accurately assessed under a tentative class determination." Malchman at 66,419.

The minimal judicial involvement which preceded the CPC and Standard Brands settlements [Developments, 1555, 1556, 1558], the failures to "prevent plaintiff-shopping and similar abuses" by enforcing the designation of "official class representative." [Id.], and the lack of sufficient discovery conducted on an adversary basis to assure development of adequate economic data are all

linked to the "tentative class" device. [Id., 1575.] Compare, Liebman, 1974 Trade Cases (CCH) ¶ 75,117 at 96,975. In Weinerger, 698 F.2d at 73, the Second Circuit reiterated the stand against tentative settlement classes taken in Grinnell:

> [W]e emphasize that we are permitting, not requiring, use of this procedure, and also underscore . . . that district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care. This is necessary in order to meet the concerns, noted in the Manual, regarding the possibilities of collusion or of undue pressure by the defendants on would-be class representatives. Accordingly, we will demand a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it in such cases than where a class had been certified and class representatives have been recognized at an earlier date.

3. The Decisions Below Approve Class Notices that Failed, as a Matter of Due Process, to Provide Sufficient Information on Which Absent Class Members Could Make an Informed Decision as to the Proper Course of Action.

An adequate settlement notice should . . . anticipate major questions class members will want answered, . . ." [Developments, 1567, n. 172.] The "best available information concerning . . . an estimated range of unitary recovery" to class members is a major question. Manual [App. 4g].

Another, sufficient knowledge to place an absent class member on notice of problems with the settlement, has been considered mandatory and of "constitutional due process dimensions." [Haudek, 789, Newman v. Stein, 464 F.2d 689, 692 (2d Cir. 1972).] Inadequate notice is as fatal as no notice. Greenfield, 483 F.2d at 834.

The notice should have revealed the controversy about all elements of the negotiations, the contentions of lack of discovery, and disclosed the opinion of at least one experienced attorney that the settlements were improper. Saylor, 456 F.2d at 898, General Motors, 594 F.2d at 1140. It should also have contained an estimated unitary recovery and an allocation formula. Corrugated Containers, 643 F.2d at 219, 214. Here, the language of the notice was calculated to dispel opposition and to discourage objection. TMT, 390 U.S. at 435.

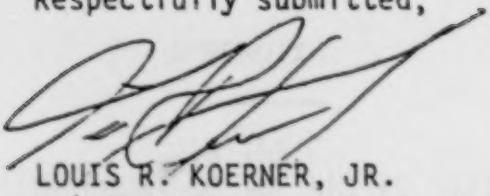
CONCLUSION

Approval of settlements based on such an inadequate record ["flying blind", Weiss, 55 F.R.D. at 169] is a failure of the courts below to live up to their "fiduciary responsibility, as the guardian

of the absentee class members . . ." Girsh, 521 F.2d at 157. Here, rather than "useful discussion of the problems raised" [Malchman, 1984-2 Trade Cases at 66,421] or "well-reasoned conclusions arrived at after a comprehensive consideration of all relevant facts," [TMT, 390 U.S. at 434], no analysis appears. No record was permitted to be established, thus leaving the reviewing court "completely uninformed." [Id., 441.]

If procedures established by Rule 23 and this Court, set forth in the Manual, and applied by circuits other than the court below are to have any value for the future, they must be applied in this case. The unwillingness of the belatedly assigned district court, affirmed by the court of appeals, to grant discovery or even cross-examination to objectors and the cursory hearings and conclusory evaluations of serious charges made by the settlement proponents made inevitable an unfair result, the product of a process which if left unchecked will eviscerate the orderly prosecution of every antitrust class action.

Respectfully submitted,



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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 85-

COCHRANE & BRESNAHAN,
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
AND JOHN E. KOERNER & CO., INC.
Petitioners,

v.

PLAINTIFF CLASS REPRESENTATIVES AND
THE PLAINTIFF CLASS
Respondents,

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
(MDL 414)

APPENDICES TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5729

IN RE: CORN DERIVATIVES ANTITRUST LITIGATION
(MDL 414)

John E. Koerner & Co., Inc.
Imperial Products Corporation, and
Pan-O-Gold, Inc.,

Appellants

Appeal from the United States District
Court for the District of New Jersey
(D.C. Misc. No. 80-00059 - Newark

District Judge: Hon. Dickinson R. Debevoise

Submitted Under Third Circuit Rule 12(6)
August 23, 1985

Before: SEITZ and ADAMS, Circuit judges,
and LATCHUM, Senior District Judge*

(Opinion filed: August 26, 1985)

---

*The Honorable James L. Latchum, Senior United States District Judge for the District of Delaware, sitting by designation.

MEMORANDUM OPINION OF THE COURT

SEITZ, Circuit judge.

This is an appeal by three objectors (objectors) from a final order of the district court, entered after hearing, approving a settlement of certain class action antitrust claims. We review for abuse of discretion.

The district court authored an elaborate opinion in which it dealt with all the factors it is required to consider in passing on the fairness of such a settlement, Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975). The objectors quarrel primarily with the court's treatment of certain of those factors. Objectors' principal contention is that the district court approved the settlement without the benefit of more discovery on the merits and that its explanation for doing so is inconsistent with a sound exercise of discretion.

The district court explained its position as to the discovery factor:

> ***in this case there are factors which make it possible to make this evaluation (fairness

> of settlement) early in the proceedings, namely, as noted previously, the government's civil proceedings, the Grand Jury proceeding, the Dimmitt case and the materials assembled by plaintiffs without the necessity of resorting to formal discovery. Assuming that there is enough information available to evaluate a settlement, and in this case I think there is, the earlier in the proceedings a settlement is arrived at the better.

We do not view this case as one involving an absence of discovery material. Rather, very substantial discovery came from related litigation and informal discovery. We do not read Girsh to preclude use of and reliance on discovery material developed in other pertinent proceedings. Furthermore, given the breadth and depth of such material in ths case, we find no abuse of discretion in the district court's reliance thereon.

Objectors also contend that the absence of pertinent discovery prevented the district court from being in a position to compare the possible dollar value of the claim against each respondent with the amount paid by such respondent into the

settlement fund. There is some substance to this contention. However, there is one overriding consideration which minimized the importance of this factor. The district court, based on the prior litigation, was not sanguine about the prospects for success on the merits. Thus, any meaningful comparison was ethereal at best. The district court was also well aware of the protracted settlement negotations and the judgment of class plaintiffs' sophisticated counsel that they had maximized the amount reasonably obtainable by settlement. Finally, the district court took cognizance of the overwhelming stockholder approval of the settlement. [Finally, the district court took cognizance of the overwhelming tacit approval of the settlement by the class.] We cannot say that in closing the record where it did the district court abused its discretion.

Objectors raise other objections, many dealing with procedural irregularities, such as the lack of adequate notice of the settlement hearing, We

think the district court adequately addressed them in its opinion. The same is true of the attack by the objectors on the fairness of the settlement terms. We find no abuse of discretion on the actions of the district court.

The order of the district court will be affirmed.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE CORN DERIVATIVES
ANTITRUST LITIGATION
THIS DOCUMENT RELATES
TO ALL ACTIONS

DEBEVOISE, District Judge.

There are now pending in ths court class actions for treble damages for alleged violations of the antitrust laws with respect to the sale of Corn Derivatives in the United States. These actions were filed beginning in December 1979 and on March 28, 1980 the Judicial Panel on Multidistrict Litigation transferred them to the District of New Jersey.

The twelve defendants have entered into settlement agreements providing for the payment in the aggregate of $12,750,000 as follows:

CPC International, Inc.- - - -4,500,000

Standard Brands, Inc - - - - -2,090,000

Penick & Ford, Limited - - - - 750,000

The Hubinger Company - - - - -	900,000
Grain Processing Corporation -	725,000
Anheuser-Busch, Inc- - - - - -	650,000
National Starch and Chemical Corporation- - - - - - - - -	300,000
Amstar Corporation - - - - - -	85,000
Cargill, Incorporated- - - - -	500,000
Archer Daniels Midland Co. - -	500,000
American Maize Products Co.- -	800,000
A.E. Staley Manufacturing Co.	950,000

Some of these payments have already been paid into a fund and are earning interest. Other payments are due at various times in the future. The total amount payable plus interest earned on funds which have already been deposited exceeds $13,000,000.

The plaintiffs' attorneys who negotiated the settlements seek to send notice of the settlements to class members so that a hearing on their fairness, reasonableness and adequacy may be held.

On April 12, 1983 I held a hearing on the

question whether the terms of the proposed settlements appear to be sufficiently fair, reasonable and adequate to justify the sending of such notice to class members.

The proponents of the settlements urge that the total amount which is to be paid is substantial and well within the permissible range of what would be deemed fair and reasonable. They urge that they have sufficient basis to form this judgment. They have reviewed large amounts of documentary material relating to the merits of their claims, including (i) the documents produces by defendants' national association, (ii) the record in the case of Dimmitt Agri Industries, Inc. v. CPC Intern. Inc., 679 F.2d 516 (5th Cir. 1982), (iii) pertinent Federal Trade Commission and grand jury records relating to investigations of CPC International, Inc., and Penick & Ford, Limited, and (iv) documents obtained from the government under the Freedom of Information Act. Plaintiffs have interviewed CPC and Standard Brands personnel. They note the

disposition of the civil and criminal investigative proceedings brought against certain of the defendants in this case.

The attorneys for plaintiffs Land O'Lakes and Pan of Gold urge rejection of the settleme t agreements and ask that an order be entered directing the parties to proceed with merit discovery, setting a time for hearing on the class issues, setting a cut off date for discovery and setting a trial date. The grounds for this position are several:

First, these plaintiffs urge that there has been no meaningful discovery and consequently the court is not in a position to assess the likelihood of success in the litigation. If the case is one which has a fair chance of going to a jury, the settlement figure, it is argued, would be grossly inadequate.

Second, these plaintiffs contend that the settlement negotiations were conducted in a manner which was not conducive to producing an adequate

amount. They note that at the outset of the litigation there were two groups of plaintiffs' attorneys vying for position as lead counsel, that one group effected a settlement with CPC and that the other group then was pressured by this development to enter into improvident settlements with other defendants. Thereafter, various of the defendants sought modification of the terms to which they had agreed on the ground that defendatnts in subsequent settlements had settled on such more favorable terms. The plaintiffs objecting to the proposed settlements point to the various affidavits and briefs filed by the contending defendants in connection with the efforts to modify the terms of specific settlements. These affidavits and briefs, it is urged, are persuasive evidence that individually and in the aggregate the settlements are inadequate.

For example, after the CPC settlement of $4.5 million had been negoitiated by one group of

plaintiffs' attorneys, the other group netotiated a settlement with Standard Brabds in the amount of $2.09 million. Commenting on that settlement, the first group of attorneys wrote in a May 17, 1982 memorandum:

> No settlement for less that $2,7/1 million could have any justifiable or rational support, particularly in view of the fact that several major producers are not settling and the litigation must continue against them in any event. It is no more difficult to litigate against Staley, Archer, Cargill, American maize and Standard than it is to litigate against Staley, archer, Cargill and American Maize. Further, any hope of an acceptable settlement with those defendants would be terminated if they saw plaintiffs grasp at $2.09 Million from Standard after the CPC settlement.
>
> . . .
>
> In view of the fact that the present proponents of a $13-$14 million settlement were previously arguing that the figure should be at least $200 million, their judgment as to either figure is subject to some question.
>
> The appropriate figure, as indicated by CPC settlement. is something in excess of $35 million.

I have reviewed the documents which the objecting plaintiffs have submitted in oposition to

the application to send out notice of the settlements to the class, and I have reviewed the papers submitted in connection with the Rule 11 and 12 (a)(6) motions heretofore filed in this case.

I have concluded that notwithstanding the objections of certain of the plaintiffs, the plaintiff class should have the opportunity to review the settlements and express its views as to their reasonableness and adequacy.

I am not persuaded that the opinions expressed by various plaintiffs' attorneys in the past reflect their views now. A number of developments have taken place since the time the original views were expressed and the context is very different.

The original settlement was effected with CPC in the amount of $4.5 million. It was negotiated on the basis of 1% of sales for sweeteners, 1/2% of sales for starch and 1/4% of sales for dextrose. It was negotiated by Harold E. Kohn, Esq. and David Berger, Esq., attorneys for certain of the plaintiffs.

Thereafter, the Executive Committee of attorneys negotiated a settlement with Standard Brands in the amount of $2.09 million. The basis for settlement was somewhat different from that on which the CPC settlement was based and gave rise to the objections referred to above.

After those two settlements had been negotiated, my predecessor in this case, Judge Meanor, sought to facilitate overall settlement discussions and brought together the attorneys for all the defendants and for all plaintiffs. Settlements with the remaining defendants were negotiated by both groups of attorneys. During that process it was necessary to reexamine the bases for settlements. Further, after the date of the memorandum which I quoted above, the government's civil penalty action was settled pursuant to a final judgment entered on June 7, 1982 by the government and certain defendants. The terms of that settlement cannot be said to have been particularly encouraging to plaintiffs in this

case. During the course of the Rule 11 and Rule 12 (b)(6) motions plaintiffs emphasized that their actions are not for violation of the 1950 FTC Consent Decree (the subject of the government civil acttion). Rather, plaintiffs' asserted, these are separate actions alleging violation of § 1 of the Sherman Act. Nevertheless, in evaluating plaintiffs' prospects, the resolution of the government's proceedings must be taken into account.

A substantial majority of the attorneys representing plaintiffs in this case urge that the proposed terms of settlements are fair, reasonable and adequate. I think that notwithstanding the fact that depositions have not been taken, they have sufficient evidentiary material available to them to evaluate this case. They are skilled and experienced attorneys in this field. They have never, as far as I know, been reluctant to prosecuts actions of this nature when circumstances warrant. I would not lightly dismiss their

recommendations.

The members of the class should have the opportunity to be advised of the settlements and to comment upon them. I am not making a final determination at this time whether the terms are fair, reasonable and adequate; that is for subsequent resolution. But particularly in a situation such as this where there are some indications that plaintiffs' claims may be difficult to establish, I do not believe that the members of the class should be denied the opportunity to be heard on the question of the acceptance of the settlement agreements which have been negotiated. The circumstances establish that the terms are sufficiently fair, reasonable and adequate to require that they be submitted to members of the class.

Consequently, I shall enter an order certifying a class and authorizing dissemination of notice to class members of the pendency of the class action and of the proposed settlement agreements and

petitions for attorneys' fees and reimbursement of expenses.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

MULTI-DISTRICT LITIGATION #414
MISC. NO. 80-59

TRANSCRIPT OF PROCEEDINGS

O P I N I O N

Newark, New Jersey
August 17, 1983

IN RE:

CORN DERIVATIVES
ANTITRUST LITIGATION

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE, U.S.D.J.

OPINION OF THE COURT

There is now before the Court a motion of the majority of the plaintiffs to approve a final settlement of this antitrust class action.

I. Procedural Background.

These consolidated antitrust actions were brought by more than 30 direct purchasers of corn

derivative products on behalf of themselves and a class of approximately 40,000 similarly situated direct purchasers seeking damages by reason of defendants' alleged price-fixing conspiracy. Defendants are corn wet millers, that is, they refine corn by a wet milling process into derivative products such as syrup, oil, dextrose and starch.

Plaintiffs alleged that defendants combined and conspired to fix, raise and maintain and stabilize the prices of corn derivative products during the period January 1, 1966 to December, 1979.

The filing of these actions was preceded and no doubt stimulated by a government civil antitrust action filed in California.

In February, 1976, the government commenced an investigation of the corn derivatives industry. That investigation resulted in the filing in December, 1979 of a government suit seeking civil penalties and injunctive relief against eight defendants under Section 5(1) of the Federal Trade

Commision Act, 15 U.S.C.A. Section 45(1) for alleged violations of a 1950 Commission ceas and desist order entered on consent. Four defendants in the present private actions, Amstar Corporation, Archer Daniels Midland, Cargill, Incorporated, and Grain Processing Corportation were not named in the Government proceedings. The Government moved to stay its action because it decided to convene a Grand Jury to continue the investigation begun in February, 1976. The Government action was dismissed on defendants' motion on April 18, 1980. The Court found that the Government action was commenced "improvidenly" and the the complaint was" in such tenuous form that it would appear that not even the Government knows what the claim is...."

On May 21, 1980, the Government filed a Notice of Appeal to the Ninth Circuit Court of Appeals. Nine days later it commenced a second civil penalty action. It is to be noted that the second action alleged a conspiracy through at least 1976 whereas the initial civil penalty action alleged a

conspiracy through at least 1979. The second penalty action concluded with final judgment on consent entered on June 7, 1982. One defendant, National Starch, was dismissed and the remaining defendants entered simple consent decrees despite the vigorous objection of plaintiffs herein. There were no sanctions imposed, monetary or otherwise.

The Grand Jury terminated its investigation on December, 1981, approximately six months after it was empaneled. No indictment or information was returned. Prior to termination of the investigation, plaintiffs' counsel met with the Department of Justice and provided extensive information regarding the corn derivatives industry. Included in this information was a detailed exposition of the Dimmitt litigation hereinafter referred to. This information did not compel either criminal or civil action by the Government.

Meanwhile the various private antitrust actions were consolidated in this Court by the Judicial

Panel on Multidistrict Litigation. The same factual allegations were advanced as those advanced in the Government cases.

Rule 11 motions to dismiss were filed, briefed and argued extensively and ultimately denied. Discovery on the merits had been stayed.

Counsel for two of the class plaintiffs who were not part of the executive committee of attorneys were successful in negotiating a settlement with CPC and Standard Brands, Inc. This precipitated considerable in-fighting among groups of plaintiffs' attorneys, various groups vying with each other to reach settlements with different defendants. Motions were filed and assertions and counter-assertions were made as one group challenged the settlement reached by another.

Shortly, however, the judge then handling the case, the Honorable H. Curtis Meanor, entered into the settlement process and there began a concerted effort of all the plaintiffs' counsel on the one hand and defense counsel on the other to reach a

settlement as to all claims and all defendants. Intensive negotiations ensued, facilitated and coordination [sic] by Judge Meanor. It's clear that no single logical thread runs through the amount which each defendant ultimately agreed to pay. For example, it cannot be said that each defendant has agreed to pay a certain percent of its sales of any given product; nor can it be said that the degree of risk of liability of each defendant was calculated and factored into the process. What can be said with considerable degree of assurance is that during the prolonged negotiations shepparded [sic] by Judge Meanor, the plaintiffs obtained from each defendant as much money as could be extracted. The proposed final settlement of the class actions with all defendants in the total principle [sic] amount of $12,750,000, set forth as follows:

CPC International, Inc.	$4,500,000.00
Standard Brands, Inc.	$2,090,000.00
Penick and Ford, Limited	$750,000.00

The Hubinger Company	$900,000.00
Grain Processing Corporation	$725,000.00
Anheuser, Busch, Inc.	$650,000.00
National Starch and Chemical Corporation	$300,000.00
Amstar Corporation	$85,000.00
Cargill, Incorporated	$500,000.00
Archer Daniels Midland Company	$500,000.00
American Maize Products Company	$800,000.00
A.E. Staley Manufacturing Company	$950,000.00

The total amount payable, plus interest earned and to be earned is expected to exceed $13,500,000 by the time of distribution to the class.

The settlements are, in the view of plaintiffs' counsel, fair, adequate and reasonable. The Court, of course, must determine whether the record establishes that this conclusion is correct.

On April 29, 1983, approximately 40,000 notices of a hearing on the proposed settlement were mailed to what is estimated to be 35,000 class members. A

summary of the notice was published in the Wall Street Journal. June 30, 1983 was the scheduled hearing date.

As of the last count, it appears that less than 500 class members exercised their option to exclude themselves from the class prior to the hearing date. I've read these requests for exclusions to a recent date. Most give no reason for their decision. Many stated either that they were not purchasers from defendants, or had made insignicicant purchases, or simply did not wish to become involved in litigation. A few of the opt outs were active participants in this case and wished to pursue their own private actions.

Prior to the June 30 hearing date several class members filed motions. There were motions for additional discovery. There was a motion objecting to approval of the settlement on the grounds that notice was inadequate to class members. Three class member, John E. Koerner Company, Inc., Imperial Products Corporation and Pan-O-Gold, Inc.,

(herein referred to collectively as the "objector") objected to the settlement.

At the hearing on June 30 I heard argument on the various issues raised by these motions. I reserved decision on the question of the adequacy of the notice. I concluded that it would not be appropriate or necessary to authorize wholesale discovery on the merits of the case. I also concluded that there was very little excuse for the attorneys who have been actively participating in this case from tne outset not to have completed an examination and analysis of the documents assembled from various sources on the basis of which plaintiffs' attorneys had analyzed the chances of success on the merits. However, the attorneys for two of the objectors were new to the case and their participation resulted from their clients having received the April notice of hearing. Therefore, I adjourned the hearing until August 17, 1983 in order to give them and any other attorneys who wished to participated time to review these

documents. They were given until August 1st to file additional objections. Plaintiffs' attorneys having custody of these documents agreed to make every effort to facilitate the review. Three law firms, I'm informed, engaged in this review prior to the August 17 hearing. Two of the law firms which have reviewed the documents did not file objections to the settlement. The objector persisted in its objection to the settlement and its attorneys filed a memorandum in support of the objection.

The reasons for the objector's opposition to the settlements are: (i) There has been no discovery on the merits and therefore the adequacy of the settlement cannot be evaluated; (ii) The settlement negotiation process was such as to produce an inadequate settlement; (iii) When the sale figures of the various defendants are examined in relationship to the amounts they are contributing to the settlement fund the results are totally anomalous and (iv) The view of the merits

of the case advanced by the plaintiffs urging settlement is unfounded.

A further hearing on the fairness and adequacy of the settlement was held on August 17.

II. Adequacy of the Notice.

The objector attacks the adequacy of the notice of the hearing on the proposed settlement. It is asserted that the notice did not advise the class members of the strength of the case and it does not advise the class members of the amount of the payment each class member will receive.

I do not believe that these objections are well founded. I approved the form and content of the notice before it was sent. It describes the nature of the case, the amount of each defendant's payment, the total amount of the settlement fund and the maximum amount which can be used for attorneys' fees.

Each class member was advised of his rights to opt out and of his right to appear and object to the settlement.

The notice gives each class member the opportunity to take such steps as he sees fit to evaluate the strengths and weaknesses of the case and to consider what the potential damages may be. This is exactly what the objector has done.

At this phase of the case each class member cannot be told what the amount of his recovery will be. This will depend on the number of class members who file claims as well as upon the plan of allocation ultimately approved by the Court. If the settlement agreement is approved, then it will be necessary to propose such a plan of allocation. At that time further notice and an opportunity to be heard will be accorded to the members of the class.

In sum, I conclude that the notice provide all necessary information to the members of the class and give them a fair opportunity to object and/or make further inquiry. Accordingly, the objector's motion to disapprove the settlement on notice grounds is denied.

III. Fairness and Adequacy of the Settlement.

A. The Industry Involved.

Corn derivative products result from a process known as corn wet milling. Shelled corn is brought to the wet milling site where it is soaked in a dilute solution of sulfurous acid in order to soften the corn kernels prior to the separation of the germs in the remainder of the kernel. After separation, the kernels are ground, screened and centrifugally separated, resulting in a slurry of purified corn starch and slurry of gluten. The corn starch slurry is then filtered, washed and dried, resulting in the production of the various starch-based corn products known as corn sweeteners, such as corn syrups and dextrose.

In addition to the sweeteners generated from the corn starch slurry, the process results in starches, modified starches, dextrin, which, inter alia, provide texture, thicken, suspend solids, and stabilize and protect fook products during processing, distribution and storage.

The separate germs of the kernels are used to make corn oils and the slurry of gluten is used to make corn gluten feed, corn gluten meal, corn gum meal and condensed fermented corn extractives which are used primarily as feed for poultry, cattle and swine. Products from the corn wet milling process used for animal feed are not part of the litigation.

According to figures which the objectors derived from market figures submitted by the defendants, the corn derivatives industry had 4.9 billion dollars of net sales during the period 1976, 1977, 1978, and 1979, the years immediately prior to filing of the civil penalties suit. The market shares of the defendants do not appear to vary greatly during this period of time. Five firms were responsible for 73.79 percent of sales of all products during that period. 67.972 percent of the corn syrup market in 1976 was accounted for by four producers. CPC, Cargill, ADM and Staley.

B. Adequacy of Discovery.

It is the objector's contention that since no discovery was taken a proper evaluation of the strengths and weaknesses of the case cannot be made and consequently there was no basis for plaintiffs' counsel to agree to settle for $12,750,000. This contention would have merit if there were no other sources of information available to plaintiffs. However, the present case is unusual in that there has already been tried another antitrust case involving the industry and related issues, the entire record of which was available in this case. Further, there were parallel Government civil and criminal proceedings which provided a basis for evaluating the present case. Discovery for discovery sake is not to be encouraged, and too frequently counsel are subject to criticism for prolonging discovery in order to run up fees or to provide an unneeded basis for a proposed settlement.

Plaintiffs have reviewed large amounts of documentary material related to the merits of their

claims. These include materials published and produced by the trade association representing defendants; documents produced by CPC International and Penick and Ford to the Federal Trade Commission and to the federal grand jury investigating price fixing of corn derivative products; documents produced by the Government pursuant to Freedom of Information Act requests filed by plaintiffs, and pertinent portions of the trial record in the case of Dimmitt Agricultural Industries, Inc. v. CPC International, 679 F.2d 516, (5th Cir. 1982). Plaintiffs have also interviewed managerial and pricing personnel at CPC and Standard Brands.

Complete development of the factual record would entail substantial additional discovery, including third party discovery, and complete development of a damage theory would require expert economic analysis and testimony to establish what prices would have been charged absent the alleged conspiracy. This effort would be costly to the class without a particular result assured.

Preparation for trial would necessitate substantial additional discovery at enormous cost to the class. Counsel who are able and experienced have concluded that the discovery to date is sufficient for them to evaluate the case and likelihood of prevailing on the merits. The objectors have advanced nothing to question this exercise of judgment.

C. Circumstances of the Settlement.

The objector asserts that the circumstances of the settlement with the individual defendants are such as to throw doubt upon the final result achieved. It is true that at the outset two groups of plaintiffs' counsel were vying with each other to reach settlements with individual defendants and during the course of that competition attacked settlements reached by other counsel, criticizing the amounts and asserting that much better settlements could or should be achieved. However, Judge Meanor quickly took control of the situation and established an orderly procedure to negotiate

the best settlements then obtainable from the various defendants.

I have reviewed all the briefs and affidavits filed by counsel relating to their internecene [sic] struggles prior to Judge Meanor's intervention and I have myself participated in the tail end of the negotiation process. I conclude the settlement process was neither collusive nor viciated by a divide and conquer strategy of the defendants. Preliminary statements by counsel as to the amounts which should be recovered are part of the long accepted process of seeking to increase the amounts to be extracted from unwilling defendants. In the last analysis all of the plaintiffs' attorneys who participated in the negotiating process are now in agreement that they have recovered as much as the defendants will pay and that the amount should be accepted.

The objector characterizes the individual settlement payments as anomalous, which they well may be when one compares the market shares of

various defendants and the shares of the total settlement which they are contributing. In fact, however, the settlements did not purport to be based on market shares. True, plaintiffs used market share figures in an effort to boost the contribution of certain defendants, and certain defendants viewed market share figures in an effort to limit their contributions. The arguments were strenuous and ingenious, all a part of the negotiating process. Plaintiffs' ultimate objective was to obtain the most money possible whatever the rationals used to persuade particular defendants to up the ante. I believe they obtained in the aggregate as much as they could, and the question is not whether each individual payment fits into some tidy rationalization. Rather the question is whether the aggregate sum is adequate under the circumstances.

D. The Likelihood of Success.

Plaintiffs' attorneys are able and experienced. They have evaluated the likelihood of ultimate

success, and their evaluation is entitled to considerable weight, e.g., Fielding v. Allen, 99 F.Supp. 137, (S.D.N.Y. 1951). They took the following factors into account:

1. Class certification: Plaintiffs moved for Rule 23 certification of a class of all direct purchasers of corn derivative products. At the time of settlement the issue had not yet been resolved. Those included in their proposed class would be major corporations and very small operations; there would be manufacturers of widely differing types of products, having very different purchasing methods. There are risks the plaintiffs would not prevail on their class motion, e.g., Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978)

2. The Statute of Limitation: The instant action was instituted in December, 1979 and alleges a conspiracy through 1979. Conversely, the Department of Justice alleged that defendants' violations continued only through 1976. If the

Justice Department allegations are correct, the applicable four-year statute of limitations would, without proof of fraudulent concealment, limit plaintiffs' claims to approximately a one-year period from mid-December, 1975 (4 years prior to plaintiffs' initial filing) through 1976.

Plaintiffs have the burden of establishing fraudulent concealment. City of Detroit v. Grinnell Corp., 495 F.2d 448, 461 (2d Cir. 1974).

The majority of cases hold that to meet their burden, plaintiffs need establish (1) that some affirmative act of fraudulent concealment occurred which frustrated discovery of the violations; (2) The plaintiffs' exercised due diligence; and (3) That plaintiffs did not have knowledge of the violation. To establish fraudulent concealment by general proof on behalf of a class, plaintiffs must show that the conduct of defendants so fraudulently concealed the violation that had plaintiffs exercised due diligence, they could not, as a matter of law discovered the violation. In re Beef

Industry Antitrust Litigation, 600 F.2d 1149, 1171 (5th Cir. 1979). However, if such a showing could not be made as a matter of law, but plaintiffs were able to prove active concealment by the conspirators, lengthy individual proceedings might be required to determine the due diligence of the individual class members. See e.g., In re Glassine and Greaseproof Paper Antitrust Litigation, 88 F.R.D. 302, 307 (E.D. Pa. 1980).

The Dimmitt action filed in 1974 could be advanced as an argument against due diligence.

3. The Government Actions: I previously referred to the two Government civil actions and the Government Grand Jury proceedings. The significance of those actions upon plaintiffs' prospect of success is suggested by the strenuous effort of plaintiffs' attorneys to persuade the Department of Justice not to enter into the settlement of the second civil proceeding. Plaintiffs' attorneys brought to the attention of the Government the Dimmitt material and other

matters available to them. However, the Government concluded that settlement with the defendants should be effected, although it was, in effect, victory for the defendants. Similarly the failure of the Grand Jury investigating the same subject matter to indict any defendant on any charge eliminated a pertinent source of proof of liability.

Whether prior Government litigation has established a prima facie case against a settling defendant is a factor in assessing the risk of litigation. Ryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3d Cir. 1974). Here, prior Government litigation has not provided plaintiffs with the benefit of a prima facie case against settling defendants. Rather, Government activity suggests a sharp increase in the magnitude of the risk of proceeding to trial; it militates strongly against success both as to liability and damages. As to liability, it suggests not only no criminal liability but also no civil liability for violation

of the 1950 cease and disist order which enjoins the very conduct that forms the basis of the class action complaints. Assuming arguendo that liability could be established as to damages, the Government action strongly suggests a damage period ending in 1976.

4. The Dimmitt Litigation: The objector's contention that this settlement will result in the forfeiture of a pot of gold at the end of the litigation rainbow is based upon the significance it attaches to the Dimmitt case. The objector seem almost mesmerized with a truncated portion of the deposition testimony of Dr. James R. Eiszner, president of CPC, taken in that case. According to the testimony in June, 1972 representatives of ADM, Staley and Cargill met with Eiszner in a New York City hotel room. Eiszner testified that ADM's representative stated: "That prices were low and they should be higher and that if we [CPC] would lead the way others would see fit to follow us." The objectors then asserted on the basis of briefs

and argument of counsel in Dimmitt that CPC acted as the price leader and that from November 1972 through 1975 prices rose substantially costing class members over $116,301,550 per year before trebling. Matched against such figures $12,750,000 does indeed look like a paltry sum.

The objectors fail to quote in their papers a portion of Eiszner's testimony in which he stated that his response to the suggestion was that he did not wish to discuss price leading and that he was leaving the meeting. Even so, if the testimony, and if the briefs in the Dimmitt case were newly discovered material which had not been considered by plaintiffs prior to agreeing to the settlement, further inquiry might well be mandated to determine if indeed plaintiffs had been unaware of important matters which might materially affect their evaluation of the strength of the merits of this case.

In fact, however, the testimony upon which the objectors rely so heavily was available to the jury

and the trial and appellate courts in Dimmitt. It was available to the Government in the civil cases and to the Grand Jury in the criminal proceedings. It was available to and considered by plaintiffs in this case. It obviously was material therefrom which they would have hoped to have built a foundation for their price fixing charges.

Turning to Dimmitt: That case was filed in 1974 by the plaintiff, a cooperative charging monopolization of the market for syrup and starch by charging unreasonably low prices during the 1971-1972 period. The complaint also charged that CPC and others combined and conspired to fix prices; that CPC attempted to monopolize; that CPC and others combined and conspired to monopolize and that CPC had engaged in Robinson-Patman Section 2(a) price discrimination violations. The case went to trial against CPC only. The jury found that CPC had monopolized the corn syrup and gluten industry by charging anti-competitively low prices to eliminate Dimmitt. It found the other charges

unsupported by the evidence. The Court of Appeals reversed the monopolization finding, affirmed the other findings, except the finding that there was no attempt to monopolize, and remanded for a retrial on the issue of attempt to monopolize.

In the instant case, plaintiffs allege a conspiracy to fix, raise and maintain prices of nearly all products in the corn wet milling process. Conversely, Dimmitt relied primarily on the charge of monopolization by CPC of the relevant market in corn syrup and corn starch. These differing factual and legal premises limit the usefulness of Dimmitt to plaintiffs in the present case.

While Dimmitt strongly suggests that CPC engaged in improper cut-throat competitive pricing does not in any way support a theory of conspiracy to raise prices. Indeed, Dimmitt would support the argument that post-1972 price increases were the result of natural competitive market forces during a period of shortages in alternative products and

rampant price inflation.

Thus the plaintiffs urging settlement in this case have sought to evaluate their chances of prevailing on the merits by considering class certification problems, statute of limitations problems, the effect of the government civil actions and Grand Jury proceedings, and the positive and negative effects of the Dimmitt litigation. They have weighed these factors in the light of the documentary and other material assembled in this case. Very experienced counsel who in the past have prevailed in difficult antitrust cases have concluded the risk of not prevailing in this case are significant. The objectors have adduced nothing which would lead me to question this evaluation. Of course, I have not reviewed the documentary material assembled in this case. However, simply on the basis of the results in Dimmitt and the outcome of the government civil actions and the Grand Jury proceedings, my own view of the likelihood of plaintiffs' success on the

merits of the case, were if pursued to trial, is considerably more pessimistic than the views expressed by plaintiffs' counsel.

Settlements are generally favored. Under Rule 23(e) of the Federal Rules of Civil Procedure, however, the trial court must evaluate the adequacy of a proposed settlement, weighing the likely rewards of litigation, that is to say, its risks and costs, against the benefits obtained by settlement. TMT Ferry, Inc. v. Anderson, 390 U.S. 414 (1968). The Court of Appeals for the Third Circuit has specified the factors which should be considered in Girsh v. Jepson, 521 F.2d 153 (1975). Weighing those factors in the present case leads me to conclude that the aggregate settlement and the individual settlements arrived at here are fair, reasonable and adequate.

If the litigation were to proceed it would be complex, lenghty and expensive. This is a major antitrust case which would be defended vigorously by the 12 defendants and pursued vigorously by able

and sophisticated plaintiffs' counsel.

The reaction of the class to the settlement here, on the whole, has been highly favorable. A few plaintiffs have opted out in order to pursue their options to bring independent actions against one or more of the defendants. An overwhelming majority of the plaintiffs participating in the litigation urge approval of the settlement. Notice of the terms of the settlement were sent to approximately 35,000 class members. Of this number only less than 500 have asked to be excluded from the class. Those who gave reasons for asking to be excluded noted factors other than disagreement with the settlement terms. Of all the class members, only the objectors John E. Koerner Co., Ind., Imperial Products Corp., and Pan-O-Gold, Inc., have filed objections to the settlement.

The case is at an early stage of the proceeding. Often this would weigh against approval of a settlement because there would be insufficient data available to evaluate the risks

and costs of continued litigation against the benefits obtained by settlement. However, in this case there are factors which make it possible to make this evaluation early in the proceedings, namely, as noted previously, the government's civil proceedings, the Grand Jury proceeding, the Dimmitt case and the materials assembled by plaintiffs without the necessity of resorting to formal discovery. Assuming that there is enough information available to evaluate a settlement, and in this case I think there is, the earlier in the proceedings a settlement is arrived at the better.

I've already discussed the risk of establishing liabiltiy, the risk of establishing damages and risk of maintaining the class action through a trial. Plaintiffs' counsel have concluded with good reason that these risks are very great. I think the plaintiffs have obtained the best settlement available at this time. My evaluation of the case is that if the objector's recommendations were followed, and the case pushed

through discovery and trial, there would be enormous effort and expense incurred with a very great risk that at the end of it all the class would receive nothing.

There is no doubt that each defendant could withstand a judgment considerably in excess of the amount it agreed to pay toward the settlement here. However, since it seems unlikely that in the last analysis plaintiffs would obtain a judgment against defendants, this is a consideration of lesser consequence.

In light of all the circumstances to which I referred above a $12,750,000 settlement together with the interest thereon is within the range of reasonableness. Under all the circumstances it compares favorably with settlements approved in other cases. Thus considering all the factors which are pertinent to the present inquiry, I will approve each of the individual settlements and the overall settlement as fair, reasonable and adequate.

5. Attorneys' Fees: This brings us to the matter of attorneys' fees requested by the attorneys for the various plaintiffs.

30 law firms which are counsel for the majority of the plaintiffs in the consolidated action have filed a joint application for attorneys' fees in the aggregate amount of $2,700,000. They have asked for reimbursement of out-of-pocket expenses in the total amount of $242,392.49. The joint application is supported by an affidavit of each petitioning law firm which sets forth the name and background of the principal lawyers who worked on this case, their regular historical billing rates, their current billing rates, the number of hours spent on this litigation other than hours for preparation of the petition for fees, their total lodestar figure and the litigation expenses incurred. In addition individual applications have been filed by three law firms who represented other plaintiffs, namely, Specks and Goldberg, Cochrane and Bresnahan and Sloan and Associates PC, each of

which submitted data similar to that supporting the joint petition.

I reviewed this material and then at the June 30 hearing requested those law firms which had not previously done so to provide me with copies of their daily time sheets so that I would be better able to determine if there had been unnecessary duplication of work.

In the figures which follow, unless otherwise specified, I have included the law firms filing the joint application and also the three law firms filing individually. Settlements had been achieved with 12 defendants in separate settlement agreements in the total amount of $12,750,000. Petitioners have devoted 16,454 hours (including attorneys, law clerks and paralegals) as of April 30, 1983 to this litigation. At their regular historical hourly rates, their lodestar amount is $2,227,954. The compensation to be awarded would also include whatever work may be required to complete these proceedings, and that work may be

quite substantial. Petitioners also request reimbursement of $276,052.30 of expenses advanced by them for the benefit of the class during the nearly four years when this matter had been in litigation.

As described above, this litigation paralleled the government's civil and criminal proceedings. Basic work for which compensation is sought may be described as follows:

Beginning in December of 1979 treble damage class actions were filed in various district courts throughout the United States on behalf of a class of purchaseres of corn derivatives, alleging a conspiracy to fix the prices in the sale of corn derivative products. Two defendants, pursuant to 28 U.S.C. Section 1407, by motion filed with the Judicial Panel on Multidistrict Litigation, requested transfer of all the private actions to the Northern District of California. Five defendants requested the Panel to transfer the cases to the Southern District of New York.

Certain plaintiffs requested the Panel alternatively to transfer the actions to the Southern District of New York, District of New Jersey or the Eastern District of Pennsylvania.

On March 28, 1980 each of those cases was transferred pursuant to 28 U.S.C. Section 1407 for consolidated and coordinated proceedings of the Judicial Panel on Multidistrict Litigation to the District of New Jersey. In re Corn Derivatives Antitrust Litigation, 486 F.Supp. 92 (1980). (J.P.M.L. 1980). Similar actions filed in ther district courts after March 28, 1980 were also transferred to the District of New Jersey.

While plaintiffs' Complaints were related to the Governmen's civil penalty actions and advanced the same factual allegations, they were not brought against defendants for violations of the 1950 FTC consent decree but were separate, independent actions alleging violations of Sector 1 of the Sherman Act.

Interrogatories and document requests as well

as motions for class certification were served shortly after filing of the Complaint.

Defendants immediately moved to dismiss the civil actions, for summary judgment, and to stay the civil cases pending the outcome of the Government proceedings. Plaintiffs, opposed all such motions, filing extensive briefs.

The first pretrial conference was held in June, 1980. At the pretrial conference, argument was heard as to the proposed form of Pretrial Order Number 1 which had been prepared and submitted by counsel both for plaintiffs and the defendants. By order dated July 12, 1980 the Court entered Pretrial Order Number 1, adopting portions of both proposed orders.

In July, 1981, after extensive briefing and oral argument, then Magistrate William J. Hunt entered a detailed report, recommending that the district court:

(a) Deny all defendants' motions to dismiss pursuant to Fed.R. Civ.P. 11 and 12(b)(6);

(b) Deny certain defendants' separate motions to dismiss pursuant to Fed.R. Civ.P. 11 and 12 (b)(4), (5) and (6);

(c) Deny all defendants' Motions to Stay the Proceedongs, based on the pendency of the Grand Jury investigation;

(d) Deny defendant Standard Brands' Motion for Protective Order; and,

(e) Stay merits discovery, except as relevant to the class action motions.

Defendants filed extensive objections to Magistrate Hunt's Report and Recommendation, to which plaintiffs replied.

While those objections and replies were under consideration, plaintiffs filed class interrogatories and document requests. Defendants filed numerous objections to the discovery requests.

At this time, plaintiffs also subpoenaed and reviewed numerous documents produced by the corn derivative manufacturers' trade association, Corn Refiners Association, Inc.

On February 5, 1982, Judge Meanor entered an order adopting Magistrate Hunt's report and recommendation as the Opinion of the Court.

Shortly thereafter, three defendants moved for Reconsideration of the Court's February 5 order adopting the Report and Recommendation, or Alternatively for Certification of that Order pursuant to 28 U.S.C. Section 1292(b). After briefing and oral argument, Judge Meanor denied defendants' Motions by Order entered September 15, 1982.

In early 1982, counsel for plaintiffs and defendants began settlement negotiations. In March, 1982, counsel entered into a settlement with CPC in the amount of $4,500,000. In connection with these settlement negotiations, CPC provided counsel with access to confidential sales date, Grand Jury documents and documents, and documents which had been produced by CPC to the Federal Trade Commission. Plaintiffs' counsel reviewed these many thousands of documents. The CPC settlement

agreement was submitted to the Court on April 13, 1982.

Shortly thereafter, in June of 1982, counsel entered into a settlement agreement with Standard Brands in the amount of $2,090,000. As part of this agreement, Standard Brands produced certain of its key employees for interview by plaintiffs' counsel and agreed to produce all its Grand Jury and FTC documents.

Within the next three months, plaintiffs also entered into settlement agreements with defendants Penick and Ford, Anheuser-Busch, The Hubinger Company, Grain Processing Corporation, and National Starch and Chemical Corporation.

Following the terms of the CPC settlement, the settlements included sales of dextrose, a product which was outside the cases as pled and thus recovery was arguably barred for any period prior to 1978. Sales of starch were also included in the settlements, although the Government Consent Decree did not include that product.

Under the auspices and direction of Judge Meanor, settlement negotiations with the remaining defendants continued throughout 1982. In the latter part of that year, plaintiffs reached agreement with Amstar Corporation, Archer Daniels Midland Company and Cargill, Incorporated.

Thereafter, plaintiffs continued to request Court authorization to resume full merits discovery and to prepare for trial against defendants American Maize Products Company and A. E. Staley Manufacturing Company and in fact deposition schedules and notices were prepared with respect to those two defendants, as well as written discovery requests.

In the meantime, again under Judge Meanor's auspices and direction and with some participation on my part, settlement negotiations continued and in April of 1983 plaintiffs entered into settlement agreements with American Maize Products and A. E. Staley Manufacturing Company, thus bringing the settlement to $12,750,000.

By order of April 21, 1983, I authorized dissemination of notice of the pending settlements to the members of the class.

The notices were mailed on April 29, 1983. Shortly thereafter a Summary Notice was published in The Wall Street Journal.

For this work the joint petitioners seek a total amount of counsel fees for all counsel in the amount of $2,700,000 constituting approximately 1.375 percent of their lodestar amount of $1,863,149. This computation does not take into account the lodestar amount of the three individual law firms filing separate fee petitions. However, I intend to treat all applications as a joint application of all law firms representing plaintiffs and to determine an appropriate fee for all plaintiffs' attorneys' legal services. I do this rather than attempting the impossible task of evaluating each firm's contribution to the total results and applying this evaluation to the hours expended by the firms. The method I'm using has

ample precedent in the authorities.

The first step under Lindy I and Lindy II, 487 F.2d 161 (3d Cir. 1973) and 540 F.2d 102 (3d Cir. 1976) is to ascertain hours spent by each attorney, to determine if the time spent was reasonably necessary in prosecuting the case and to apply the normal, reasonable hourly billing rate to the hours reasonably necessary in order to determine the lodestar figure.

I've examined each separate affidavit submitted by the attorneys and I have also examined the time sheets submitted pursuant to my request.

There is obvious duplication in the sense that each attorney had to review the facts prior to filing a complaint for his particular clients; each attorney had to draw and file a complaint and take all the other action necessary to set in motion this litigation on behalf of his clients. I have no doubt it contributed to the strength of plaintiffs' overall position to have different clusters of plaintiffs represented by different law

firms participating in this action. Some law firms did little more than engage in this preliminary matter, and that is all for which they request compensation in relatively modest amounts. I do not consider this to be invidious duplication and I think those hours should enter into the lodestar figure.

After consolidation of the cases in this district, I do not detect undue attorney duplication. Obviously more than one law firm was required to participate in settlement negotiations. Equally, obviously not every attorney had to participate in every phase of the settlement discussions. An examination of the time sheets suggests an appropriate but not overattendance of attorneys during the settlement phase of the case.

Similarly on motions and discovery, some attorneys did the bulk of the work; other attorneys quite properly refrained from doing what had already been adequately done by others. Time records reflect who did what.

In sum, I conclude that the hours spent as set forth in the affidavits were reasonably necessary to accomplish the end result.

I have also examined the hourly rates claimed in the affidavits. They vary widely within firms, depending on the experience of counsel and they vary widely among firms. They reflect in part the degree of experience of the attorneys in the antitrust field, and they also reflect differences in locales, the going rate being higher in some areas than in others. All are within the range of fees approved by other courts.

I conclude that the lodestar was computed in a reasonable manner and should be $2,227,954 taking into account the joint petition and the three separate petitions.

Next it must be determined whether the lodestar should be adjusted upwards or downwards, taking into account such matters as, (i) the complexity of the case, (ii) whether ultimate compensation was contingent in nature, (iii) the risk assumed by the

attorneys depending on the likelihood of success on the merits and the likelihood of proving substantial damages, (iv) the delay in receiving compensation and recovery of out-of-pocket expenses, (v) the results obtained, (vi) the professional expertise utilized in processing the case.

For experts in the field of antitrust law, I do not consider this case was extraordinarily complex at either stage of its prosecution. At the outset plaintiffs had the Dimmitt case and record as a benchmark, and they expected to follow in the footsteps of the government as it prosecuted the civil and criminal proceeding. During the second stage of the case, after the government proceedings ended not in a bang but in a whimper, plaintiffs were confronted with the necessity of making the best of a bad situation, involving skills of negotiation and persuasion rather than the intricate problems of antitrust law. Recovery of attorneys fees was contingent. The risk of

recovering nothing was always present, and after termination of the government proceedings that risk was appreciably greater. There were serious problems in establishing liability and if liability were established there were serious problems relating to the period for which damages could be recovered.

Under the circumstances I consider the amount recovered to be eminently satisfactory. Objectors could compare the recovery to a theoretically huge sum. I think realism suggests that it be compared to a jury verdict of no liability.

Very able counsel appeared on both sides of the case. Nothing came easily to either side. Every step was hotly contested. Objectors complained that there was inadequate discovery, but I firmly believe that one sign of skillful advocacy is to know when enough is enough. It would, of course, have been possible for plaintiffs' attorneys to have carried on discovery long after their best judgment informed them that they had obtained all

the information necessary to evaluate the strengths and weaknesses of the case and the appropriateness of the settlement. That they did not elect to run up additional hours and consume inordinate resources of the defendants, themselves and the Court, is to be viewed as a sign of skillful work rather than the opposite.

The petitioning plaintiffs have requested fees in the aggregate amount of $2,700,000. This represents approximately 20 percent of the total settlement fund including interest in excess of $750,000 which will be earned as of October 1, 1983, a rather optimistic target date for distribution of the settlement funds. The notice of hearing on the proposed settlement stated that attorneys fees would not exceed 20 percent of the settlement fund, which is defined as the settlement amount and interest thereon.

This constitutes a multiple of approximately 1.375 of the lodestar of the attorneys filing the joint petition. It constitutes a multiple of

approximately 1.211 of the lodestar of those attorneys together with the lodestar of the three other law firms. I would award a multiple in at least that amount and therefore a total fee for all attorneys for plaintiffs in the requested amount of $2,700,000 will be awarded.

The objectors note that serious work remains to be done in determining the method of allocating the settlement fund. The fee is to cover legal services required to accomplish that task. To reflect that fact I will require that Layment of 15 percent of the total fee allocated to each law firm be deferred until all the ministerial tasks of consummating the settlement shall have been accomplished. At the appropriate time application may be made for payment of the remaining 15 percent of attorneys fees.

I have reviewed the disbursements claimed by each law firm aggregating $276,052.30. These may be reimbursed as soon as this order becomes final and the time for appeal has expired without any

appeal having been taken. The various firms have included among their disbursements the $3500 assessment for class expenses. This item may be reimbursed provided the unexpended portions of the assessment are applied to class expenditures or otherwise used for the benefit of the class. I would request the plaintiffs' attorneys to submit form of order.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

MDL NO. 414

MISC. 80-59

HON. DICKINSON R. DEBEVOISE

In re Corn Derivatives Antitrust Litigation
This Document Applies to: All Class Actions

ORDER AND JUDGMENT

This Court, having been advised by counsel in a motion made on behalf of the plaintiff class and by counsel for the defendants of the Agreements of Settlement between the class representatives and the settling defendants, A.E. Staley Manufacturing Company, American Maize-Products Company, Amstar Corporation, Anheuser-Busch, Inc., Archer Daniels

Midland Company, Cargill Inclorporated, CPC International, Inc., Grain Processing Corporation, The Hubinger Company, National Starch and Chemical Corporation, Penick & Ford, Limited and Standard Brands, Incorporated, respectfully filed with the Court from time to time prior hereto (the "Settlement Agreements") setting forth the terms and conditions upon which the parties proposed to settle these actions; and

Having conducted a final hearing on August 17, 1983, upon notice to the parties and to the members of the class to determine the fairness, reasonableness and adequacy of the settlement and whether final approval should be given to the settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and the Court having heard from all counsel, parties and class members desiring to be heard and from all objectors, and having considered the pleadings filed, the argument of counsel and all proceedings in these actions,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS

FOLLOWS:

1. The proposed Settlement Agreements and each of them are in all respects hereby finally approved as fair, reasonable and adequate pursuant to Rule 23(e) of the Federal Rules of Civil Procedure;

2. Due and adequate notice was directed to those persons required to be notified, and such notice fully complied in every respect with the requirements of Rule 23 of the Federal Rules of Civil Procedure and the Settlement Agreements;

3. The within actions are dismissed with prejudice as to each of the settling defendants and each of the settling defendants is hereby discharged from all liability to plaintiffs and to all members of the class, as defined in the Settlement Agreements in respect of any and all claims of any member of the class as against any settling defendant, as defined in the Settlement Agreements;

4. Each settling defendant shall pay all sums

remaining to be paid under its respective Settlement Agreement in accordance with the terms of said Agreement;

5. the provisions of this Order and Judgment shall inure to the benefit of and be binding upon each settling defendant and each member of the class and each of their respective parents, subsidiaries, successors, assigns and representatives;

6. Pursuant to rule 54(b) of the Federal Rules of Civil Procedure, it is hereby determined that there is no just reaosn for delay, and it is therefore directed that there be forthwith entry of judgment dismissing these actions, with prejudice, as to each of the settling defendants;

7. Without affecting the finality of this Order and Judgment in any way, the Court hereby retains continuing jurisdiction over the administration of the settlement for all purposes, including the resolution of any disputes that may arise and the enforcement of the obligation of

defendants to make payments provided for in the settlement as well as the distribution of the amounts to be paid in settlement.

/s/

DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

September 7, 1983

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In Re Corn Derivatives Antitrust Litigation	:
This Document Applies to All Actions	:

MDL No. 414
(Hon. Dickinson R. Debevoise)

NOTICE OF PENDENCY OF CLASS ACTION
AND
PROPOSED SETTLEMENTS WITH DEFENDANTS
AND PETITIONS FOR ATTORNEYS' FEES
AND REIMBURSEMENT OF EXPENSES

TO: PURCHASERS OF CORN DERIVATIVES WHO ARE MEMBERS OF THE CLASS HEREINAFTER DESCRIBED

This Notice is given pursuant to rule 23 of the Federal Rules of Civil Procedure and Order of the Court dated April 21, 1983. There are now pending before this Court class actions for treble damages for alleged violations of the antiturst laws with respect to the sale of corn derivatives in the Untied States. The defendants are A. E. Staley Manufacturing Company; American Maize-Products Company; Amstar Corporation; Anheuser-Busch, Inc.;

Archer Daniels Midland Company; Cargill Incorporated; CPC International, Inc.; Grain Processing Corporation; The Hubinger Company; National Starch and Chemical Corporation; Penich & Ford, Limited; and Standard Brands, Incorporated.

Defndants, while denying the alleged violations and any liability, have agreed to settle the claims asserted for a total amount of $12,750,000 as set forth below, and solely for the purpose of effectuating those settlements, have agreed to the establishment of a Settlement Class. This Class is defined as follows:

> All persons (excluding defendants and all parents, subsidiaries and affiliates of defendants and any other domestic manufacturer of corn derivatives) that purchased corn derivatives during the period from January 1, 1966 to March 31, 1982, directly from any defendant, or parent of subsidiary or affiliate of any defendant.

Definition of Corn Derivatives

"Corn Derivatives," as used in this Notice and the Settlement Agreements, means the following products and only the folowing products made from

the corn wet milling process and sold in the United states: all types of corn starch (including, without limitations, pearl starch, all modified starches, all speciality starches, gloss starch, powered starch, thin boiling starch, moulding starch, refined starch, grits, and dextrin); all types of corn syrup, regardless of dextrose equivalency (including, without limitation, corn syrup unmixed, blends, corn sugar, corn syrup solids and maltodextrin); high fructose corn syrup, regardless of dextrose equivalency; hydrate hextrose; and corn oil (including, without limitation, crude and refined corn oil).

PLEASE TAKE NOTICE

If you purchased any corn derivatives in the United States from any of the defendants at anytime during the period from January 1, 1966 to March 31, 1982, you are a member of the Class and may have a right to participate in the proposed settlement, except that defendants, their parents, affiliates, or subsidiaries and any other domestic manufacturer

of corn derivatices are not class members and may not share in these settlements.

If you are a class member, you may elect to be excluded from the Class, provided such election is made in writing. All such documents must be postmarked on or before June 15, 1983. Persons who elect to be excluded will not be entitled to share in the benefits of any judgement, if it is favorable to the plaintiffs and the Class, or in the proposed settlements, and will not be bound by any judgement if it is adverse to plaintiffs and the Class. If you do not elect to be excluded, you will be bound by any judgement or other disposition of this action regardless of whether it is favorable or not, and by the terms of the settlements and any judgement entered pursuant thereto if final approval is granted by the Court. Your election to be excluded should be mailed to:

Clerk of the Court
Untied States District Court
District of New Hersey
Post Office Box 419
Newark, New Jersey 07102

with the workd "Election to be Excluded" on the envelope.

All such documents should refer to the name and number of this litigation. In Re Corn Derivatives Antitrust Litigation, M.D.L. 414.

if you do not elect to be excluded, you may, if you desire, enter an appearance through counsel of you own choosing. If you do not elect to be excluded and do not enter an appearance through your own counsel, your interests will be represented by the Class representatives and counsel for the Class.

THE LITIGATION

Plaintiffs allege that, at least as early as January 1, 1966 and continuing thereafter at least until December 31, 1979, defendants combined and conspired unlawfully to fix, raise and maintain and stabilize the price of corn derivatives in the United States. Plaintiffs further allege that, as a result of defendants' alleged combination and

conspiracy, the prices paid by Class members, who are purchasers of corn derivatives in the United States from defendants, were higher than they otherwise would have been, and plaintiffs seek recovery ot treble damages under the United States antitrust laws.

Defendants deny the claims, deny any liability, deny that any plaintiff or any potential Class member is entitled to any damages, and assert a number of affirmative defenses in this litigation.

This Notice is sent to you in the belief that you may be a member of he Settlement Class whose rights may be affected by these lawsuits. This Notice should not be understood as an expression of any opinion by this Court as to the merits of the claims or defenses. This Notice is sent for the sole purpose of informing you of the pendency of these lawsuits, of the settlements described below, and of the petitions for attorneys' fees and reimnursement of expenses.

SUMMARY OF PROPOSED

SETTLEMENT WITH DEFENDANTS

Plaintiffs have entered into individual settlement agreements, with all degendants involving settlement amounts aggregating $12,750,000.00. Interest is accruing on certain funds which are on deposit in escrow under the supervision of the Court. The individual settlement amounts are as follows: CPC international, Inc., $4,500,000; Standard Brands, Incorporated, $2,090,000; Penick & Ford, Limited, $750,000; the Hubinger Company, $900,000; Grain Processing Corporation, $725,000; Anheuser-Busch, Inc., $650,000; National Starch and Chemical Corporation, $300,000; Amstar Corporation, $85,000; Cargill Incorporated, $500,000; American Maize-Products Company, $800,000; and A. E. Staley Manufacturing Company, $950,000. The settlement amounts and the interest are referred to herein as the Settlement Fund.

Copies of each of the Settlement Agreements referred to herein are on file in the office of

the Clerk, United States District Court for the District of New Jersey, United States Courthouse and Post OFfice Building, Federal Square, Newark, New Jersey 07102, and are available for inspection and copying during regular office hours. The proposed settlements herein described are fully set forth in the various Settlement Agreements.

Each of the defendants has retained the right to withdraw from its Settlement Agreement if the requests for exclusion from the Class are substantial. If any defendant does elect to withdraw, its contricution to the Settlement Fund will be refunded and the litigation will proceed against that defendant and any other defendant that elected to withdraw.

PLAN OF ALLOCATION AND DISTRIBUTION

Counsel for Plaintiffs will submit a plan of allocation and distribution of the Settlement Funds (subject to such reserves as the Court may establish) if and only after the settlements are judicially approved and become final. The plan of

allocation and distribution must be approved by the Court.

OTHER MATTERS

All attorneys' fees, costs and expenses of litigation and expenses of notice, and the administration incurred to date in connection with this litigation and these settlements, as may be allowed or approved by the Court as fair and reasonable, shall be deducted from the settlement proceeds. Attorneys' fees will not be awarded in excess of 20% of the Settlement Fund, plus reimnursement of costs and expenses. Petitions for attorneys' fees will be filed by May 17, 1983 and will be availablt for review at the Clerk's office during regular office hours.

NOTICE OF HEARING

A hearing will be held before the Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, beginning June 30, 1983, at 10:00 a.m. in the United States Courthouse and Post Office Building, Courtroom IV,

Federal Square, Newark, New Jersey, to determine (a) whether the proposed settlements of the pending class actions are fair, adequate, and reasonable and should be approved, and (b) the award of attorneys' fees, costs and expenses. Should the Court approve all or some of the settlements, judgments shall be entered, (a) approving the settlements as fair, reasonable and adequate and binding all Class members who have not filed timely requests to be excluded; (b) discharging each defendant (and all predecessors, successors, parents, subsidiaries, affiliates and all present and former officers, directors and employees of the degendants and in the case of American Maize-Products Company) of all further liability to, and dismissing with prejudice any action or claims on behalf of, any member of the Settlement Class which arise or could arise under the antitrust laws of the United States, or the antitrust laws of any state or other jurisdiction, or any similar statutory or common laws based on

purchases of corn derivatives and which are in any way related to any facts, matters or claims asserted or which could have been asserted in any of the complaints in these class actions with respect to such purchases, and (c) reserving jurisdiction over the administration of the settlements. Said hearing may be continued from time to time without further notice.

Any member of the Class may appear at the hearing and (1) show cause, if any, why the settlements should not be approved as fair, reasonable, and adequate and why final judgments of dismissal should not be entered, and (2) object to the petitions for attorneys' fees and reimnursement of costs and expenses. No person will be heard at said hearing unless written notice of intention to appear, stating all grounds for te objection or other statement of position, together with all supporting papers and briefs, is filed not later than June 15, 1983, with:

Clerk of the Court

United States District Court
District of New Jersey
Post Office Box 419
Newark, New Jersey 07102

Copies of all such papers filed herein also must be served on the following counsel by June 15, 1983.

Clive S. Cummis, Esq.
Sills, Beck, Cummis, Zuckermam,
Radin & Tischman
33 Washington Street
Newark, New Jersey 07102
Plaintiffs' Liaison Counsel

Richard D. Cantenacci, esq.
Connell, Foley & Geiser
Gateway I, Suite 1600
Newark, New Jersey 07102
Defendants' Liason Counsel

Any inquiries in connection with this Notice shall be made only to either or both of the aforementioned Liason Counsel.

Allyn Z. Lite
Clerk of Court
United States District Court
Courthouse and Post Office
Building
Newark, New Jersey 07102

Dated: April 21, 1983

APPENDIX F

Fed. R. Civ. Proc. Rules 23(c)(1-2)

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Fed. R. Civ. Proc. Rules 23(d) and 23(e)

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

1.46 Criteria and Procedure for Approving Class Action Settlements[127]

In a class action, the determination of whether a proposed settlement is fair and reasonable is normally at least a two-step procedure. The first step involves a preliminary determination of whether to give notice of the proposed settlement to members of the class and whether to schedule a hearing at which to receive evidence in support of and in opposition to the proposed settlement. Unless the judge is preliminarily satisfied that the proposed settlement is within the range of possible approval, there is no point in proceeding with notice and a hearing.

Accordingly, rather than automatically accepting the assurances of counsel that the proposed settlement is a good one and should be submitted to the class members, it is usually desirable to have a preliminary hearing. At such a hearing the judge should learn the circumstances surrounding the negotiations and should hear from not only the parties and counsel who participated in the negotiations but also those, if any, who were left out of the negotiations.

Among the pertinent inquiries that might be pursued at such a hearing are:

1. At what stage in the proceedings was the proposed settlement achieved?

2. Has there been any development of facts, through discovery or otherwise, on which estimates can be

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U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975).

127 This section has been cited with general approval in In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1124 & n.22 (7th Cir. 1979) ("We recognize that the Manual does not provide 'an inflexible formula or mold into which all . . . pre-trial procedure must be cast.'. . . In appropriate cases, however, the Manual does provide a rough guide by which to measure whether the trial judge acted within his discretion."); 3 Newberg on Class Actions § 3260; Forde, *Settlement of the Class Action*, 5 Litigation 23 (1978).

made of the probability of liability and the range of possible damages?

3. Can the proponents of the settlement submit data to establish, at least preliminarily, the reasonableness of the proposed settlement?

4. Who were the negotiating parties, and to what extent were they authorized to proceed with the settlement of their classes' claims and possibly those of other classes?

5. Did all counsel for all parties participate in the negotiations and, if not, what are the views of the nonparticipating parties and counsel?

6. If the proposed settlement relates to only one of a number of classes, what effect will it have on the claims of the other classes?

7. How and by whom are fees of class counsel to be paid—from the settlement fund or otherwise?

8. In either event, what are the estimated fees and expenses, so that class members can calculate the cost of their prospective participation in the settlement?

Discovery may be conducted prior to the preliminary hearing on the issue of whether the proposed settlement is within the range of being fair, reasonable, and adequate.[128] When the settlement has been negotiated before the designation of classes and appointment of class representatives, "the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class."[129] The "Primary criterion for the court in

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[128] *See, e.g.*, Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. 531 (N.D. Ill. 1973).

[129] Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971). *Cf.* In re General Motors Corp. Engine Interchange Litigation, 594 F.2d at 1129 n.38 (adverting to the "inadvisability of creating tentative subclasses for settlement purposes without careful examination of the adequacy of the representation of *each* subclass."); Shelton v. Pargo, Inc., 582 F.2d 1298, 1315 (4th Cir. 1978) (holding that the court may approve a precertification settlement if, after proper inquiry, it determines that the proposed settlement is not "tainted by collusion or will prejudice absent putative members with a reasonable 'reliance' expectation of the maintenance of the

evaluating the fairness and adequacy of a proposal is an informed estimate of the probabilities of both liability and damages. . . . Only by making such an estimate can the court decide whether the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures are worth the relinquishment of plaintiffs' claims."[130] Often, the estimate of possibility and probability of the plaintiffs' prevailing on the liability issue can be made from "the allegations and . . . the information . . . adduced in the discovery proceedings"[131]—at least for the purpose of this preliminary determination. Economic data should be presented to the court in the preliminary inquiry on the damages issue, and the parties may be permitted to give their informed estimates of what the damages may be.[132]

Such a preliminary hearing is not, of course, a definitive proceeding on the fairness of the proposed settlement, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable, and adequate. In appraising

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action for the protection of their interests."); 3 Newberg on Class Actions § 3260 at 12 ("[T]he *Manual* suggests that any settlement discussions would be inappropriate until after the court has entered a class ruling, and that it is improper to establish tentative classes for settlement purposes only. Many courts have questioned the practical aspects of adhering to either of these recommendations, because of the inhibiting effect on facilitating reasonable settlements among the parties before a class ruling."); Miller, *supra* note 26, at 59-60 ("[T]he *Manual* . . . argues that a true settlement never should be allowed prior to certification because the risk of abuse is too high if the inquiries required by the seven class action prerequisites are not made. . . . I have become convinced in recent years that there really is a serious problem of the judge not having enough information prior to certification to do a completely effective job under Rule 23(e)."). *See also* In re Beef Indus. Antitrust Litigation, 607 F.2d 167, 174 (5th Cir. 1979).

130 Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. at 535.

131 Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. 531. The success or lack of success in a prior criminal prosecution based upon the same alleged violations may also be helpful in preliminary determination of this point.

132 *Id.*

the possibilities and probabilities of recovery and the possible range of damages for the purposes of submitting or approving the settlement proposal, the judge should carefully avoid expression of any opinion that constitutes a prejudgment of the outcome of the litigation or a final judgment on the merits. On the contrary, he should make clear that it is simply a determination that there is, in effect, "probably cause" to submit the proposal to members of the class and to hold a full-scale hearing on its fairness, at which all interested parties will have an opportunity to be heard and after which a formal finding on the fairness of the proposal will be made.

The notice of the proposed settlement should be given in the same manner as that previously used in giving notice of the class action, unless a more effective notice procedure is available as a result of information obtained in the interim. The notice itself must adequately describe the proposed settlement and should include the best available information concerning fees and expenses that may be deducted from the gross amount. The notice should also contain an estimated range of unitary recovery (e.g., amount per share, per unit, per dollar charged, and the like) that members of the class may expect to receive if the settlement is approved.[133] It must, of course, specify the time and place at which the formal hearing on the fairness of the settlement will be conducted. It may also provide for the receipt of written comments from those class mem-

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133 "As a general rule, the contents of a settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.' . . . In addition, the notice on its face must be 'scrupulously neutral' and emphasize that the court is expressing no opinion on the merits of the case or the amount of the settlement. . . . In effectuating this neutral apprisal the notice may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses. Manual for Complex Litigation §§ 1.45-1.46 (and related appendices) (1973) . . . . In effect, appellant is suggesting that a copy of the agreement must be included with the notice in order to satisfy due process standards. We have found no basis for such a requirement. *See generally* Manual for Complex Litigation § 1.45 (1973)." Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir.), *cert. denied, 423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975).*

bers unable to attend in person; such a provision is recommended.[134]

The standards for determining whether a class action settlement should be approved, after the final hearing on the issue, have been enunciated in several recent cases. In general, the court should determine whether the proposed settlement is "fair, reasonable, and adequate."[135] The burden is on the proponents of the proposed settlement to show that it meets those standards.[136] The trial judge, in making his determination, may be guided by the following and other relevant considerations:

1. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement"[137]

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[134] *See* § 1.45, *supra*. *See also* Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970). For a discussion of class action settlements, *see* Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971 (1971). *See* sample settlement orders and notices to various classes, §§ 1.45-II, *infra*.

[135] Grunin v. International House of Pancakes, 513 F.2d at 123; West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971). *See also* In re Four Seasons Sec. Laws Litigation, MDL Docket No. 55 (W.D. Okla., Dec. 18, 1972).

[136] Grunin v. International House of Pancakes, 513 F.2d at 123; Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. at 531.

[137] West Virginia v. Chas. Pfizer & Co., 314 F. Supp. at 740. *See also* Grunin v. International House of Pancakes, 513 F.2d at 124; City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974); Young v. Katz, 447 F.2d 431, 434 (5th Cir. 1971). *But see* Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912, 91 S. Ct. 879, 27 L. Ed. 2d 811 (1971). In some cases, this factor may be almost wholly determinative of whether the proposed settlement should be approved or disapproved, particularly after the preliminary inquiry. *See, e.g.*, Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. at 535-36 (When the available evidence showed that plaintiffs could make a prima facie case and the economic data presented showed that, if they prevailed, "the minimum single damage figure . . . [appeared] to be in the vicinity of $2,200,000 . . . [trebled to] $6,600,000," a proposed settlement of $1,000,000 in cash and $500,000 in future credits was rejected as inadequate.). A settlement in the sum of $2,300,000 was ultimately approved. Liebman v. J.W. Petersen Coal & Oil Co., 63 F.R.D. 684 (N.D. Ill. 1974).

2. "[T]he defendant's ability to pay"[138]

3. "[T]he complexity, length and expense of further litigation"[139]

4. "[T]he amount of opposition to the settlement."[140]

The "determination is committed to the sound discretion of the trial judge" and his views are to be accorded "great weight" on appeal "because he is exposed to the litigants and their strategies, positions and proofs [and] is aware of the expense and possible legal bars to success."[141] "Only upon a clear showing that the district court abused its discretion will . . . [the] court [of appeals] intervene to set aside a judicially approved class action settlement."[142]

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[138] Grunin v. International House of Pancakes, 513 F.2d at 124; City of Detroit v. Grinnell Corp., 495 F.2d at 463. *See* Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. at 531.

[139] Grunin v. International House of Pancakes, 513 F.2d at 124.

[140] *Id.* This list is not exhaustive. Other factors may and should be considered when they are relevant. *See, e.g.*, City of Detroit v. Grinnell Corp., 495 F.2d at 463, for other suggested factors. It is fundamental that an illegal settlement agreement cannot be approved by the court, as when the agreement itself violates the antitrust laws. *See* Grunin v. International House of Pancakes, 513 F.2d at 123-24. Nor can a settlement be approved if it was obtained by fraud or if it frustrates the purpose behind the laws meant to be enforced by the statutes under which the action was brought. *See* Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. at 536, rejecting a contention "that the fairness and adequacy of the [settlement] proposal should be based on an estimate of the percentage of claimants who can actually be expected to file meritorious claims" because "settlement on this basis would mean that the defendants would retain a substantial portion of any illegal gains rather than be penalized for their violations of the anti-trust laws as Congress clearly intended by its provision for treble damages."

[141] Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971); Grunin v. International House of Pancakes, 513 F.2d at 114. But "the court is not to substitute its business judgment for that of the parties." Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. at 535.

[142] Grunin v. International House of Pancakes, 513 F.2d at 123. The denial of the trial court's approval of a proposed settlement of a stockholder's derivative action has been held to be not applicable. Seigal v. Merrie, 590 F.2d 35 (2d Cir. 1978). This ruling may be applicable to proposed class action settlements.

At the hearing itself, every effort should be made not only to hear all interested parties desiring to be heard, but to adduce all information necessary for the judge to rule intelligently on whether the proposed settlement is "fair, reasonable, and adequate." It may be useful in this regard for the judge to conduct a pretrial conference with counsel, prior to the hearing, to outline areas of information that he wants covered at the hearing. These should include the issues of both liability and damages, since the fairness of any settlement will inevitably involve judgments on both.

The criteria for an ultimate finding that the proposed settlement is fair, reasonable, and adequate will necessarily include consideration of the questions previously suggested for the preliminary hearing, as well as all other relevant data. The economic data, by the time of the final hearing, should be fully developed. What is relevant to fairness will of course vary from case to case, but if the procedure heretofore suggested is followed, the judge should be in a position to make a determination at the conclusion of the hearing, unles the course of the hearing reveals that more information is necessary.[143]

In any event, the entire procedure should be carried out as expeditiously as possible. A pending settlement proposal should not be grounds for suspending discovery or other pretrial processes. At the same time, expenditure of time and money on discovery should be minimized by expeditious consideration of any settlement proposal.

In order to approve a settlement, the court must find that the proposed settlement is fair, reasonable, and adequate with respect to all classes and subclasses involved. Particularly in civil antitrust class actions in which settlements are proposed, the need of the court for reliable economic data is great. In the absence of reliable economic data concerning the damage suffered by each class and subclass as a result of the alleged ille-

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[143] It should be remembered, however, that "[i]n examining a proposed compromise for approval or disapproval . . . the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial." Young v. Katz, 447 F.2d at 433.

gal conduct, a rational determination of what is fair, reasonable, and adequate cannot be made.

In approving or disapproving a settlement, the court should make written findings of fact and conclusions of law on the issue of whether the proposed settlement is fair, reasonable, and adequate. Only if such written findings and conclusions are made can the determination be adequately reviewed.

In the exceptional circumstances described in section 3.40, *infra,* a court-appointed expert can be of invaluable assistance in providing and evaluating such economic data.[144] And there may be cases in which some of the plaintiff classes not only have not been damaged but may have profited as a result of the illegal practices.[145] Only an examination of reliable eco-

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[144] *See* Sample Order Appointing an Expert for Evaluation of and Report on Proposed Settlement, § 1.46-II, *infra.* For a somewhat more thorough discussion of the value of a court-appointed expert, *see* § 3.40, *infra.* One has only to read such cases as West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971), to become aware of the extremely important role that economic data play in the settlement of a complex action. In Ace Heating & Plumbing Co. v. Crane Co., a settlement was approved without any evidence of "quantities, prices and overcharges" before the trial court. 453 F.2d at 34. The appellate court affirmed the approval on the basis of the "probability that overcharges made upon . . . [claimants] were passed on to their customers." *Id.* The basing of a settlement on sheer speculation about "probabilities" would have been properly avoided by resort to economic data.

[145] This appeared in West Virginia v. Chas. Pfizer & Co., where the following was said:

> [I]t appears at first glance to be highly doubtful whether wholesalers or retailers suffered any damage whatever. Defendants sold only in dosage form; this means that the wholesaler then sold in the original packages (at a mark-up of 16 2/3% or more over cost) and that—if the retail druggist did not always sell in the original packages but repackaged in varying quantities—at least the retail druggist sold the dosage form just as received from a wholesaler or from a defendant and without any addition, subtraction or combination. To the consumer, antibiotics are sold only by prescription. In some instances the retail druggist may charge his cost, plus a flat professional fee. According to affidavits of experts in the field, however, the overwhelming majority of drug stores in the period 1953-66 charged for prescription drugs a uniform mark-up of 66 2/3% over cost. If so, this would

nomic data can provide the information absolutely necessary to the performance of the judicial function in approving or disapproving the settlement in such cases.

Since, in most cases, economic data will have been of significance in determining the propriety of a class action and the proper membership of classes and subclasses, it is conceivable that much of the economic data presented on the class action issue can also be used on the issue of approval or disapproval of the settlement. Care should be taken to avoid undesirable, premature, unauthorized settlement negotiations in class actions. Ordinarily, a class action determination should be made before any settlement negotiations occur.[146] Therefore, all settlement negotiations on behalf of the class ordinarily should be conducted by counsel representing the class in the litigation.

Some of the reasons for this recommendation are set forth by the United States Court of Appeals for the Third Circuit in *Ace Heating & Plumbing Co. v. Crane Co.,* as follows:

> [Appellants] argue that the inadequacy stems implicitly from Sullivan's having bargained the settlement terms with defendants prior to his official designation by the court as class representative . . . that a person who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendants' wishes. This is so because such an individual, lacking official status, knows that a negotiating defendant may not like his attitude and may try to reach a settlement with another member of

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mean that any overcharge by defendants was passed on to the end use purchaser. The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations.

314 F. Supp. at 745.

The limitation of claimants to direct purchasers in treble damage action under section 4 of the Clayton Act should be applied. Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).

[146] These recommendations are cited in McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 419 n.3, 420 (7th Cir. 1977) ("The suggestion of the Manual that there should be a class action determination before any settlement negotiations wisely provides for the majority of cases.").

the class . . . The attorneys' fees and the prestige attendant upon probable appointment as class representative are the rewards for the attorney who bargains successfully with the defendants.[147]

Another aspect of settlement of class actions that requires examination is the growing practice of forming tentative classes for the purposes of settlement. Such classes have been formed with court-approved provisions for notice to members of the class informing them that they shall accept the settlement or opt out and be required or permitted to litigate their claims for relief. There is some doubt that this practice is authorized by Rule 23 as amended, even if one concedes that the courts are expected to develop new methods of employing the amended Rule 23.

Consideration of this practice, in view of the provisions of Rule 23 and experience to date, leads to the conclusion that tentative classes for the purposes of settlement, with or without provision that the members should be required or permitted to opt out and litigate their claims for relief, should ordinarily not be formed.

Several reasons support this conclusion. (1) Rule 23 does not expressly authorize formation of tentative classes for the purpose of settlement. (2) There usually can be no assurance that the class members will be adequately represented in the settlement negotiations until the court makes the findings, which are a condition precedent to the formation of a class, after an opportunity for an evidentiary hearing. Formation of a tentative class for the purpose of settlement, with a requirement that the class members accept the settlement or opt out and litigate independently, might deny the members of the class the opportunity to show the inadequacy of the representation of the class by the representative party or parties agreeing to the settlement and their counsel. (3) The appropriate membership of the class and the identity of the members ordinarily should not be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law. Nor can there usually be any assurance that the tentative class will be

147 453 F.2d at 33.

composed of members without conflicting interests. Absent such findings and conclusions, it may be difficult to determine how many members there are in a class, who they are, the aggregate of claims of all members of the class, the amount of the individual claim of each member in relation to the total claims of all members of the class and, therefore, the amount of money that will be payable to each member of the class. This information would seem to be essential for a member to make any rational choice between whether to remain in the class and accept the benefits of the settlement or to opt out. (4) If the information relevant to liability, damages, and the expense of preparation for trial and of trial is not developed, there usually cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered for the class. (5) Formation of a tentative class for the purpose of settlement preempts determination of the question whether the claim for relief should be litigated for the members of the class or should be the subject of further pretrial preparation, with a view toward securing a better settlement or a trial on the merits. It also preempts the question of which parties and counsel should represent the tentative class, since there must be an unofficially negotiated earlier settlement for the purpose of the formation of the tentative class. (6) The formation of a tentative class for the purpose of settlement denies the class member the choice, contemplated by amended Rule 23, to become a member of the proposed class for the purpose of litiagation, with adequate representation as a member of litigating class. (7) Formation of such a class denies a member of the class the right to appear in the action as a party and to maintain the position of a litigating party. (8) Formation of such a class might lead to a long delay in preparing the case for trial, for those parties who desire to litigate their claims for relief. (9) In the absence of reasonable discovery conducted on an adversary basis by counsel representing the class, it is difficult to determine whether the proposed settlement has any relation to the economic facts of life relevant to the case.

It has been suggested that the foregoing opposition to the formation of tentative classes for the purpose of settlement constitutes a hostility to settlements that is unknown to the law generally, where settlements are favored. But settlement of class actions is a most sensitive area. Simply because the action is a prospective class action, "the named plaintiffs have additional leverage when negotiating for settlement of their individual claims."[148] And it would be unfair to permit defendants to settle under threat of a class action that may not really exist.

Compounding the difficulty of such a situation is the admonition of Professors Wright and Miller that "[t]he court also must be sensitive to the possibility of collusion between the parties actually participating in the action."[149] Rule 23(e) makes the court the protector of the rights of absent class members. The scope of such rights is difficult to assess accurately under a tentative class determination. It has also been suggested, however, that because of the omnipresent power of the court under Rule 23 to vacate or modify class action orders, all classes are, in reality, always tentative. But it can hardly be a matter of debate that rights are immeasurably more likely to be protected after a class action determination by the court resolving the necessary factual issues on the best available evidence, including the important economic data that should be analyzed and used. The ultimate test of fairness and reasonableness is more apt to be met in such a case.

In a case in which a tentative settlement class would have affected one of four defendants, a small firm in bad financial shape that "had received a tender offer" from a healthy company "conditioned upon . . . settlement of the anti-trust actions," the formation of the tentative settlement class and the settlement were approved. In that case it was stated that temporary settlement classes were favored in exceptional circumstances "where there is . . . no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the

148 Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 at 483.

149 7A Wright & Miller, Federal Practice and Procedure § 1797 at 230.

trial judge."[150] On the other hand, more recent decisions appear to recognize that the class representatives have no right to have a settlement approved except on terms that are fair and reasonable to the entire class.[151]

In certain cases in which many of the facts relevant to settlement are not disputed, it may be desirable to permit those facts to be established by the uncontradicted representations of counsel in briefs or otherwise. Normally, however, in view of the complexity that ordinarily attends settlement issues, it is wise in most cases to rely upon proven facts, particularly economic facts.

Two types of provisions in settlement agreements have appeared with sufficient frequency to warrant comment. The first is a provision that the fees and sometimes expenses of plaintiffs' counsel are to be paid separately by the defendant(s) over and above the settlement. Frequently, the amount thereof is not disclosed at the time the settlement is proposed. Such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement fund and should be known and disclosed at the time the fairness of the settlement is considered.[152] In most cases, disclosure should be regarded as sufficient if the maximum sum that may be allowed is stated in the notice of the proposed settlement that is transmitted to the class members. The abuse to be prevented is the making of collateral private, undisclosed agreements for payment of attorneys as a feature of a class action settlement.

The effect of such an arrangement is to neutralize the court's power and responsibility to pass upon the reasonableness of the amounts to be paid to plaintiffs' counsel, since any

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[150] In re Beef Indus. Antitrust Litigation, 607 F.2d 167.

[151] See Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981), holding that the class representatives have no right to opt out of the class action being settled on terms that are fair and reasonable to the entire class.

[152] This section is cited in McDonald v. Chicago Milwaukee Corp., 565 F.2d at 423. ("The Manual for Complex Litigation emphatically disapproves of a provision that fees and expenses of plaintiffs' counsel be paid separately by the defendants over and above the settlement.")

reduction by the court of the amount counsel agree upon after the class settlement has been approved will simply reduce the aggregate amount defendant(s) will pay and will not increase the amount to be paid to the plaintiffs. As a result, there is little incentive for the judge to reduce the agreed-upon fees. On the other hand, the effect of such an arrangement may be to cause counsel for the plainiffs to be more interested in the amount to be paid as fees than in the amount to be paid to the plaintiffs. Only if the aggregate of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment about the fairness and reasonableness of a proposed settlement.

When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees, there is an inherent conflict of interest.

The other type of provision is the so-called most-favored-nations or most-favored-customers clause. There are two different variations of this type of provision with somewhat different consequences. One is that plaintiffs will not make a later settlement with other defendants that is more favorable than the settlement they are making with early-settling defendants, without giving the early-settling defendants a refund to equalize the early and later settlements. The other provides that defendants will not make a later settlement with other plaintiffs that is more favorable than the settlement they are making with early-settling plaintiffs, without paying the early-settling plaintiffs an additional amount to equalize the early and later settlements.

Both variations of this type of provision inject special problems into the normal dynamics and logistics of the development of a case, either to settlement or trial, and absent extraordinary and very special circumstances, they should be avoided. For example, an early settlement saves the early-settling defendants the substantial expenses of discovery. Moreover, the early-settling defendants may well be those whose liability is clearest. Finally, discovery may disclose that the plaintiffs' case against the nonsettling defendants warrants a settlement less favorable to plaintiffs than the one they made with the

early settlers. Yet, under the first type of most-favored-nations clause, plaintiffs must either obtain a later settlement at least as favorable as they secured from the early-settling defendants, or make a refund. As a result, a trial that nobody wants may be forced under circumstances in which all concerned, including the court, agree that a smaller settlement with the late-settling defendants would be fair and reasonable.

The other type of most-favored-nations provision is potentially even more troublesome. Again, early-settling plaintiffs are saved the usually substantial expenses of discovery. By settling, they take the proverbial "bird in the hand" and obviate the possibility that defendants may ultimately be successful in defending the action. Moreover, the early-settling plaintiffs may have weaker cases than those not settling, which may be a factor in the amount of the early settlement. Finally, the discovery efforts of other plaintiffs may demonstrate that they, at least, are entitled to a better settlement than was made with the early settlers. Yet, under this second type of most-favored-nations clause, defendants can make no better, later settlement without paying additional amounts to the early-settling plaintiffs who are, in effect, "freeloading" on the efforts of the nonsettling plaintiffs. As a result, again, cases that would be more justly disposed of in a later settlement are forced to trial.

The second type of provision is also undesirable in that it tends to cause plaintiffs' counsel and the court to be less careful in evaluating the fairness of the early settlement, since presumably any unfairness will be protected against by the most-favored-nations clause.

In practice, however, these clauses have usually had time limits after which they were no longer applicable. The result has been that either the case went to trial, possibly unnecessarily, or the remaining parties waited until the clause expired by its terms and then proceeded to settle on terms more or less favorable than those of the early settlements. The latter procedure, of course, is susceptible to a charge by the early settlers that in fact the later settlement was discussed or even agreed upon prior to the expiration date and therefore is subject to

the most-favored-nations clause. This may generate extensive additional litigation.

It has been suggested that the use of the clause assuring the early-settling defendant(s) no less favorable treatment than that afforded the later settlers is justified if the funds to be secured from the early-settling group are needed by the plaintiffs to finance the discovery and possible trial of the cases against the nonsettling defendants. While this is an understandable objective, the previously discussed caveats against such a provision are all applicable. As a practical matter, it will be a rare case in which an early settlement made in part to secure litigating funds will be less favorable to the settling defendant(s) than later ones made in the light of further discovery. In the rare case, it is highly likely that the factors previously discussed (savings in expense of discovery, difference in probability of liability, etc.) will justify plaintiffs' making a less favorable later settlement. It is also likely that the most-favored-nations clause will work an injustice rather than correct it, while giving the early-settling defendants a "free ride" on the work of their nonsettling codefendants.

As indicated, the complications and even inequities that most-favored-nations clauses almost always generate make their use undesirable.[153] Moreover, they are frequently unnecessary. A fair and reasonable settlement should stand on its own merits without what has in practice turned out to be a spacious hedge or insurance provision. If the unusual situation should arise in which such a clause is deemed desirable on balance, notwithstanding its inevitable disadvantages, it is suggested that invocation of the clause be subject to a finding by the court that its later application would be fair and reasonable. The court should further have the power to declare the clause inapplicable if it finds that the early-settling plaintiffs or defendants would receive an unfair and unreasonable benefit if the clause were to be applied in connection with a later settlement.

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[153] *See* In re Chicken Broiler Antitrust Litigation, Civil Action No. C74-245A (N.D. Ga. Mar. 28, 1979).

APPENDIX H

TABLE AND DESCRIPTION OF COURT AND COUNSEL

Judiciary

Judge Dickinson R. Debevoise

Last district court judge to whom the case was assigned. He participated in the Negotiation of the reduction in the CPC settlement and preliminarily and finally approved all settlements.

Judge Clarkson S. Fisher

Second judge to whom MDL 414 was assigned. Entered Pre-Trial Order No. 1 and later recused himself.

Magistrate William J. Hunt

Magistrate to whom certain discovery motions and other problems were assigned.

Judge H. Curtis Meanor

First and third judge to whom the case was assigned. He participated in negotiation of several settlements subsequent to CPC and Standard Brands.

Counsel

Lawrence John Appel

Member of the Alioto firm representing Dimmitt Agricultural Cooperative and initially an adherent of the Saveri Group. His clients have opted out of the settlements.

David J. Berger

Member of the Plaintiffs' Steering Committee, but not a member of the Plaintiffs' Executive Committee. He, Harold Kohn, and others entered upon successful negotiations with CPC International and negotiations with other defendants without authority from the Plaintiffs' Committee.

John A. Cochrane

Member of the Plaintiffs' Steering Committee and of the Plaintiffs' Executive Committee. Assigned to review the Dimmit case in Texas. Objector in the district court and court of appeals.

Joseph Cooper

Member of the Plaintiffs' Steering Committee, assigned to review the Dimmit case in Texas. On behalf of Safeway Stores, et al., appeared in the district court and requested additional discover on the merits and on the circumstances of the settlement negotiations.

Bud Holman

Counsel for Stokley-Van Camp, appeared at the settlement hearings, urging discovery and additional time.

Allen S. Joselyn

Counsel for CPC International, Inc.

Louis R. Koerner, Jr.

Counsel for two objectors, appearing first after settlement class notice, in the district court, court of appeals, and for petitioners herein.

Harold Kohn

Member of the Plaintiffs' Steering Committee, but not a member of the Plaintiffs' Executive Committee. He, David Berger, [\"Kohn/Berger"] and others entered upon successful negotiations with CPC International and negotiations with other defendants without authority from the Plaintiffs' Committee.

Kohn/Berger Group

Harold Kohn, David Berger, and others entered upon successful negotiations with CPC International and negotiations with other defendants without authority from the Plaintiffs' Committee.

Seymour Kurland

Plaintiffs' counsel and adherent of the Saveri Group.

John L. McGoldrick

Candidate of Kohn/Berger Group for Plaintiffs' Liason Counsel.

Denis McInerney

Counsel for CPC International, Inc.

Plaintiffs' Discovery Committee

Plaintiffs' attorneys assigned by the Plaintiffs' Steering Committee to conduct discovery. Adherents of the Saveri Group.

Douglas Rigler

Plaintiffs' attorney and adherent of the Saveri Group.

Guido Saveri

Head of the of the Plaintiffs' Sterring and Executive Committees.

Saveri Group

Plaintiffs' attorneys appointed by Pre-Trial Order No. 1.

Arthur Sills

Plaintiffs' Liason Counsel per Pre-Trial Order No. 1 and a member of the "Saveri Group."

APPENDIX I - SYNOPSIS OF THE APPENDIX ON APPEAL

In the Court of Appeals, petitioners filed a three volume, 875 page appendix. For the convenience of the Court, that Appendix is synopsized under the major categories of Discovery, Settlement, the Dimmit case [Dimmitt Agri. Business Inds., Inc. v. CPC International, 679 F.2d 516, rehearing denied (5th Cir. 1982), cert. denied, ___ U.S. ___ (1983)], the Goverment proceedings, and the Effect of the Statute of Limitations on Damages.

DISCOVERY

A. Results of Discovery

Plaintiff's First Wave Interrogatories were filed on 2/22/80 [N.D. Cal. A-42-62], containing requests for information encompassing nearly all of the discovery later requested by objectors. Answers would have provided the basis on which to conduct deposition discovery and to obtain transcripts and documents from the government

investigations. There were numerous requests for information that may not have been contained in the government documents [e.g. volume, costs, and profit by product (¶9), meetings with competitors and exchange of pricing information (¶16)]. Neither answers nor responses were ever received.

Pre-trial Order No. 1 [D-20, A-64-77, 7/3/80] ordered preservation of documents [A-73]. In August, 1980, at a hearing before Magistrate Hunt, plaintiff's liason counsel stated that this case, though of "national import," had been "stopped dead in its tracks by various motions" and by the "refusal" of defendants to "submit to discovery" until the motions had been heard [A-78].

Magistrate Hunt offered to dispose of discovery matters by telephone and by motions accompanied by short notice applications [A-79]. According to him, discovery on the class action aspect

> is not independent of substantive discovery that may be requested by the plaintiffs. So, that unless I'm persuaded to the contrary, I'm not inclined to delay substantively the discovery by the defendants [sic] to permit

> the defendants, who are opposing the class action aspect, to have discovery on class action issues. [A-81.]

The July, 1981 order of Magistrate Hunt [A-509] stayed merits discovery, except as relevant to the class action motions. No objection to this order was filed by plaintiffs [A-509].

Plaintiff's Request for Production of Documents RE Class Action Issues [D-83, A-83-87, 9/8/81] requested the following categories of documents: 1) Organizational charts, places of business, type of business conducted at each location, identification of persons with managerial authority; 2) Documents describing or discussing the "corn derivative market and/or industry;" 3) Annual reports; 4) Price lists of the particular defendant and all other companies or groups in the industry; 5) Market analyses, projections, price comparisons, etc.; 6) Market shares or penetrations of the companies who are in the market; 7) Trade Organizations; 8) Customer lists; 9) Sales of product by dollars and volume; and 10) Market share

analyses and price comparisons for the market and for different competitors.

Plaintiff's Joint Class Action Interrogatories [D-92, A-88-98, 9/16/81] requested similar information, but included at ¶ 6, a request for production of market share documents and projections, and for competitive analyses, etc. [A-96.] The objections of CPC [D-99, A-98-105] were typical of those filed by all defendants [D-94-127], and provided no information. CPC also filed objections to every document request [D-100, A-106-113], as did all other defendants [A-509], based on the pendency of the Rule 11 motions and pendency of the stay of merits discovery "to which plaintiffs did not object." [D-99, A-99.] [Contrast the stated willingness of Magistrate Hunt to assist in discovery, A-79, 81.] Defendants also claimed that plaintiffs failed to stay within the class action limitation on discovery. Answers and production were not made at that time nor since that time by 10 of the 12 defendants.

On 11/24/81, a consent order was entered directing all parties to keep documents produced to the government in U.S. v. CPC International available and in good condition until further order of the Court. [D-129, A-114.]

Despite the objections, Plaintiffs' Discovery Committee entered into negotiations with defendants. The agreements reached were confirmed by letter of March 25, 1982 [A-197]. Defendants agreed to provide answers to interrogatories showing 1) "places of business, business activities at each place of business, and identity of persons in managerial positions." 2) "All studies, surveys, analyses, and documents of a similar nature, of the corn wet milling industry or of the market for any corn product, including projections of supply and demand." 4) "Each Defendant agrees to produce responsive documents sufficient to show its own prices in effect throughout the relevant time period." Defendants agreed to certify temporal completeness or to identify the time periods for

which it was not complete. Plaintiffs could still get cross-information from other defendants.

Defendants agreed to furnish documents responsive to requests for production 7, 8, and 9, to answer interrrogatories 1, 2, 3, 11 and 12, and to answer interrogatories 4 and 9 by producing documents. As to interrogatory 5, "Defendants agreed to state pricing rules and formulae of general applicability." As to 6, 7, and 8, defendants agreed to produce market studies and analyses [A-197]. This agreement was complied with by no defendant. The only information provided by any defendant was the voluntary production by CPC and Penick & Ford of documents subpoenaed by the FTC and the grand jury.

On 4/30/82, a protective Order was entered concerning disclosure of FTC and Grand Jury documents of CPC [D-167, A-253-254], and permitting, for the first time, disclosure of CPC's product sales and these CPC documents.

Attached as Exhibit "A" to D-171 [A-263] was a

letter of April 26, 1982. Each plaintiff's counsel would be "informed as to the significant items contained in the [CPC] documents, which will then be available for the prosecution of this litigation, . . ." This was confirmed in a letter by Allen S. Joslyn to H. Curtis Meanor of 4/27/82 [A-237], stating that "Said counsel [Kohn/Berger] will make such information available to other counsel for plaintiffs." However, as of 8/27/82, Arthur Sills wrote to Guido Saveri [A-351]: "Berger and Kohn received 60,000 or 70,000 documents, they claim in late April. They were going to report to the plaintiffs' counsel but they never have. Should this be followed up?" This report appears never ever made. The report initially prepared contained conclusions adverse to CPC. A later version was not sent out [A-821]. Furthermore, the documents produced by CPC, upon examination by objectors, were found to contain numerous gaps [A-822]. This conflicts with the statement of the proponents of the settlement [D-459, A-510] that a

review of these documents was made, "narrowing the documents to those which would be useful throughout the balance of the litigation."

The voluntary production by CPC resulted in CPC's not filing a formal and unequivocal response to the Plaintiffs' Request for the Production of Documents from CPC International, Inc. and interrogatories filed on 4/28/82 LD-165-66 A-242; CPC's response is D-179, A-281]. These were requests by the Plaintiffs' Steering Committee, claimed by them at the time to be the minimum adequate to demonstrate the factual basis, if any, for the settlement, and included requests for the settlement agreements and all drafts and letters pertaining thereto (¶¶ 1-2), the terms of the settlements or the proposals (¶ 6), and contacts and correspondence between Kohn/Berger and CPC (¶¶ 7-9). The Steering Committee also requested all notices of class action (¶ 3), all documents given before, during, or after the settlement negotiations (¶¶ 4-5), together with such documents

as may be necessary to show sales of corn derivative products and market share or penetration for 1966-1982 (¶¶ 10-11). [Compare these to the discovery proposed by objectors, A-553-570, and refused by the district court, A-605, A-842.]

On May 21, 1982, Judge Meanor entered an Order directing all defendants to file detailed reports pertaining to "Product" [D-177, A-264-265], the first information "ordered" to be produced by any defendants. While helpful, this order was very limited and the product information ordered to be produced had no bearing on the merits of the case. On the same day, Messrs. Berger/Kohn wrote in a Memorandum with Respect to Settlement Negotiations [A-266-279] that one advantage to the CPC settlement was that "5. Immediate access was provided to a substantial amount of discovery previously refused by all defendants; . . ."

After a hearing, the magistrate, on 7/27/82, entered an Order Concerning Discovery [D-212 A-314-316] in which certain of the disputed issues

not agreed to between counsel in the letter of March 25, 1982 [A-197] were ruled upon, some in accord with the positions urged by plaintiffs, others in accord with objections of defendants. The favorable rulings did not result in the providing of any information. Also, counsels' agreements predicate to the rulings of the magistrate were never enforced.

In the settlements between plaintiffs and Standard Brands, Hubinger, Anheuser-Busch, National Starch, Grain Processing, and Amstar, each defendant agreed to produce documents under a "cooperation" clause [A-416-419].. In a letter of 8/27/82 to Mr. Saveri, Mr. Sills stated [A-351-352]:

> Enclosed is a chart which shows the due date for lists of customers. . . In addition, the chart shows the commencement date for the production of F.T.C. and Grand Jury documents and cities where documents are to be produced.
>
> I am unaware of anyone who has given us the customers lists or has produced documents and if documents have been produced, of anyone who is inspecting them. I had

understood that our Discovery team would work on this matter. Do you have any knowledge of the facts pertaining to this?

Mr. Saveri responded [letter of 8/30/82, A-353], enclosing a Stipulation and Order relating to "production" of "FTC and Grand Jury documents." His letter states, "The defendants who signed the stipulation are prepared to produce the documents immediately." (Mr. Saveri expected to get the same stipulation from National Starch.) After the judge signed the order, the Executive Committee, he states, "will discuss the next steps to be taken in connection with the documents, including the CPC documents." Although on 9/3/82, such a Stipulation and Order [D-222, A-354-357] was signed, the parties defendant being Anheuser-Busch, Grain Process, Hubinger, Nabisco (Standard) Brands, and Penick & Ford, no documents were produced pursuant to such stipulation except by Penick & Ford.

Plaintiffs recite what happened in their joint fee petition [D-459, A-510-511]:

Shortly thereafter, in June of 1982,

> counsel entered into a settlement agreement with Standard Brands in the amount of $2,090,000. As part of this agreement, Standard Brands produced certain of its key employees for interview by plaintiffs' counsel and agreed to produce all its grand jury and FTC documents.
>
> The settlements [apparently Penick & Ford, Standard Brands, Anheuser Busch, Hubinger, Grain Processing and National Starch] required defendants to produce their FTC and grand jury documents. Those of Penick & Ford [only] were produced and inspected by plaintiffs' counsel. Review of documents of the other defendants was deferred pending settlement negotiations with the remaining defendants. [emphasis supplied.]

The documents of five or more additional defendants were available, had been agreed to be produced, but were not produced. Compare statements made by attorneys for defendants at the hearing of June 30, 1983 that "discovery on the merits as to the defendants is really contrary to the settlement and the intent that was reached . . ." [A-620.] The district court may have been mislead at the hearing of 7/27/83 [D-833] by the contentions of Hubinger counsel that appear contrary to the settlement agreement that his

client signed. See also the colloquy between Hubinger counsel and the district court [A-703], and Hubinger counsel's response to the comment of the court [A-704]: "if documents were available, wouldn't it be well to have them [objectors] go through them." Hubinger counsel stated that the 6/30/83 decision of the district court was that discovery "would only be granted as to what the plaintiffs' executive committee was basing its decision on." [A-710.]

> THE COURT: That's all that was available. If there had been more, I would certainly let them see whatever else there was.

The Plaintiffs' Committee, until the final few settlements, made the voluntary production of documents and witnesses an integral part of the settlement agreements. The district court, now Judge Deveboise, the third judge to be assigned this case, had previously stated his lack of familiarity with the case [A-395, 451]. The court had stated its desire to "get educated more adequately" because of his lack of "confidence in

looking at the merits" at the April hearing. The objectors similarly sought such information:

THE COURT: As I see your [Mr. Koerner's] situation, you want to look at additional documents. You have not found any smoking gun which has not previously been available to me and to plaintiffs' attorneys.

MR. KOERNER: But, then again, I never had an opportunity to look anywhere that had not been at least available to be searched [A-820].

Consistent with this position, the district judge stated as to the initial request to provide insight to the custodian California court as to need for the production of documents in the possession of the government, which had been produced in the FTC and Grand Jury investigations.

THE COURT: All I can do is state the obvious usefulness to you [Mr. Koerner], being you have to look at this material along with all the other material, which is pertinent to the question of reasonableness of the settlement. [A-719.]

B. Counsel's Comments on Adequacy of Discovery

In the Statement of Certain Plaintiffs, etc. [filed 4/12/82, D-152, A-186-200], prepared by the

Plaintiffs' Discovery Committee, "Disclosure of underlying support data" was requested as follows:

> The Court has a duty to insure that settlements which extinguish claims and the rights of a class are fair. This appraisal cannot be made in a vacuum. Defendants have resisted all discovery, both on the merits and with respect to certification of the class.
>
> There is no basis on which the adequacy of the settlement can be assessed since the vast majority of the plaintiffs have received no information from CPC. [A-189.]

One of the problems that they, as counsel designated to supervise discovery, perceived was that the dissension among plaintiffs' counsel gave the defendants "an opportunity to refuse to make any discovery because they contend that they are uncertain as to which counsel speaks on behalf of all plaintiffs." They attach correspondence in which they characterize counsel for defendants as "refus[ing] to produce even those documents which previously were the subject of agreements between the parties." [A-191.]

The correspondence referred to, a March 30,

1982 response [A-199] to a letter setting forth agreements concerning discovery of March 25, 1982, states in pertinent part:

> Given recent developments, there is obviously some dispute amongst plaintiffs' counsel as to who should be acting for the plaintiffs. Because of this dispute, we presume that you are not acting on behalf of all plaintiffs' counsel. Until such time as that dispute is resolved, we believe it premature to proceed. Defendants simply do not wish to be put in a position of having to answer multiple, and possibly conflicting, requests for discovery from different factions of plaintiffs' counsel.

At other times in the litigation, the lack of discovery concerning the merits or concerning the proposed settlements has been cited. Mr. Sills, plaintiffs' liason counsel, wrote then Judge Meanor [4/14/82, A-202-203], citing the prior history of "this covert settlement" [with CPC] and requesting that there be "an opportunity" to "develop a record with respect to the proposed settlement." John L. McGoldrick, Kohn/Berger candidate for plaintiffs' liason counsel, suggested to Judge Meanor [5/7/82, A-257] the probability of low settlements,

requesting permission "d) to proceed to merits discovery on an expedited basis against the remaining non-settling defendants." The stated purpose of this was to prevent settlements at less than acceptable levels with remaining defendants.

In the Memorandum of Plaintiffs in Opposition to Defendants' Motion for Reconsideration [A-299-310], plaintiffs suggest that the appropriate time to challenge the sufficiency of plaintiffs' allegations is "after there has been an opportunity for discovery and the Court has been presented with an adequate factual record to make its determination." [A-308-309.]

During the 8/6/82 hearing on reconsideration of the Rule 11 motions [D-221, A-332-33], the following colloquy occurred between the court and one of plaintiffs' counsel:

MR. KURLAND: If we ever get a chance to have some final discovery on the merits we'll soon know whether these people [defendants, including Staley, ADM, and Cargill] did anything.

It seems we may be spending another five years on motions to reconsider, preliminary matters, instead of either getting it settled --

THE COURT: There's another answer. You don't have to have your merits to discovery but apparently I've --

MR. KURLAND: We still can't take the depositions and find out what they did. They say we are a sham, without letting us have the discovery. That's really the proper way to proceed.

Josef Cooper, who as a member of the Plaintiffs' Executive Committee in this case had been assigned with John A. Cochrane, former counsel for Pan-O-Gold and a current member of the Plaintiffs' Executive Committee, to examine the Northern District of Texas case brought by Dimmitt Agricultural Cooperative, stated on behalf of Safeway Stores, et al., objectors:

> Movants wish to conduct sufficient discovery concerning the facts and circumstances concerning each of the settlements to intelligently determine whether to elect to be excluded from the litigation, or if not, whether to support or oppose the proposed settlements. [A-548.]

Mr. Cooper's clients wished to respond to the invitation of the district court for the class to "express its views as to their reasonableness and adequacy [of the settlements]," but "presently have an inadequate factual basis to do so." [A-574.] They wished to make "informed and intelligent choices among the available alternatives for their future involvement in this litigation, and, after review of the available record herein, do not have a sufficient factual basis for doing so." Mr. Cooper's clients therefore requested time and the "opportunity to take necessary and appropriate discovery regarding the bases for the proposed settlements of this litigation; . . ." [A-575.]

> Discovery to date by plaintiffs against defendants and third parties has apparently been extremely limited, and hence no great burden can be anticipated in responding to the Movants' application. The paucity of such formal and adversarial discovery, however, makes all the more important the proponents' careful and detailed articulation of the reasons for the settlement. [A-583.]

These comments were repeated at the hearing of June 30, 1983 [A-607-610], and joined in by the attorney for Stokley-Van Camp [A-614-615], that for Beatrice Foods and Quaker Oats [A-617-618], and that for Koerner, et al.

At that hearing, John A. Cochrane characterized the discovery and the order staying merits discovery [A-839] as an "absolute Catch 22." [A-819] He stated that Judge Meanor "foreclosed discovery and would not entertain discovery motions." [A-819.]

C. The District Court on Discovery

The Hon. Dickinson Debevoise stated [A-846]:

> It is the objector's contention that since no discovery was taken a proper evaluation of the strengths and weaknesses of the case cannot be made and consequently there was no basis for plaintiffs' counsel to agree to settle for $12,750,000. This contention would have merit if there were no other sources of information available to plaintiffs. However, the present case is unusual in that there has already been tried another antitrust case involving the industry and related issues, the entire record of which was available in this case. Further, there were parallel Government civil and

> criminal proceedings which provided a basis for evaluating the present case.

He later stated [A-858]:

> The case is at an early stage of the proceeding. Often this would weigh against approval of a settlement because there would be insufficient data available to evaluate the risks and costs of continued litigation against the benefits obtained by settlement.

Although the district court considered this case to be an exception to the usual discovery rules and cited the existence of the Dimmitt case, it appears that a substantial portion of the material produced not only by CPC but by other defendants in Dimmitt was not available. Mr. Cochrane stated at A-818:

> I had discussed the matter there [Dimmitt case in Texas] to see if we could get the protective order . . . that the Court issued lifted. It was our decision at the time we would have to await other discovery to show a need there for her to lift the protective order.

Mr. Cochrane stated his belief that there was additional material in the Dimmitt productions, which he could not review because of the protective order. Further, some of the depositions in the

Dimmitt case were sealed by order of that court.

CONFLICT AMONG COUNSEL AND SETTLEMENT

A. Comments of Objectors

The conduct of counsel, the negotiations leading to the settlements, and the amounts of the settlements were criticised by competent attorneys during all the proceedings in the district court. The negotiations were stated to be "highly suspect as arms length transactions" [D-720, A-520] and "long and convoluted," and the contention was made that "the record developed to support the settlements here is a product of that same convoluted process." [A-656.]

Counsel for Safeway Stores, et al., Mr. Josef Cooper, also a former member of the Plaintiffs' Steering Committee, justified his clients' need for discovery "by the fact of allegations by various plaintiffs' counsel concerning the conduct of this litigation." [D-751, A-583.] He continued at A-584:

> The fact of such internecine disputes, standing alone, gives Movants reason for concern, particularly since (as both the

> Court and those counsel themselves have recognized) the judgment of plaintiffs' counsel regarding adequacy of the settlements is properly a factor to consider in evaluating their adequacy. The problem facing Movants, however, is which set of statements to believe and which to disregard.
>
> The apparent division of plaintiffs' counsel raise the spectre of "plaintiff shopping" by the various defendants in this litigation, possible resulting in lower settlements than would have been otherwise obtained. Such potentially competing settlement teams of plaintiffs' counsel create the possibility of negotiation from a position of weakness by the attorney who purports to represent the class, as well as the risk that defendants could play one set of plaintiffs' counsel off against another, based upon each group's desire to be the one who consummates the settlement. [A-587.]

At the June 30 hearing, the circumstances in which these settlements came about and were presented to the Court were described by Mr. Cooper as "peculiar." [A-610.]

B. The History of the Negotiations

On 3/18/82, the Kohn/Berger Group filed a Notice of Motion for appointment of themselves as lead counsel, etc. [D-146, A-116-132]. This motion was in connection with the negotiation by

the Kohn/Berger Group of a settlement with CPC which one of its "architects" David Berger "characterized" as "McInerney [attorney for CPC] got a low bargain-basement settlement without any merit discovery." [D-235, A-425.] The basis of the motion was said to be to "effect termination of certain on-going abuses of class action procedures in this case and to prevent their re-occurrence." The structure of the plaintiffs' committee had been feared "unwieldy" and "wasteful," [A-119] and was then so perceived by Messrs. Kohn and Berger.

The "elaborate Committee structure" was charged to be leading to "inefficiency, duplication of effort, and unnecessary expenses to the members of the proposed class." It described a "pyramiding" of committees. [A-122.]

> This is blatant over-lawyering by a group of attorneys who continuously combine in cases throughout the country, proliferating representation among many law firms, many of whom have no real clients, to run up unnecessary hours and perform useless work, all at the expenses of the class they supposedly represent. [A-123.]

"It is manifest" said the Kohn/Berger Group "that this structure is inefficient, over-layered and over-lawyered." Lawyers were accused of filing complaints merely to "control the 'vote' as to who would 'run' the case." "These counsel have set up a structure which they hope will reward them, at the expense of the class, by deliberately running up and requesting excessive counsel fees." [A-126.] The Plaintiff's Committee was characterized as "specializing in proliferation." [A-128.] There had been antagonisms between the Saveri Group and the Kohn/Berger Group from the beginning of the litigation and in other litigations [Fine Paper].

In reply, [Affidavit of Guido Saveri, 3/19/82, D-147, A-133], Mr. Saveri described a meeting of the Plaintiff's Steering Committee on 2/25/82 at which appointment had been made of seven attorneys, the Executive Committee, to "pursue all settlement discussions," excluding Kohn and Berger. However, on 3/15/82, Mr. Saveri was informed that

settlement discussions had taken already place between Messrs. Kohn/Berger and Denis McInerney, attorney for CPC, "without the knowledge or authority" of the Plaintiff's Committee. [¶ 4, A-134.] He verified this and informed CPC that Messrs. Kohn/Berger were "not authorized to speak for Plaintiffs' Steering Committee or the class," but that a Committee had been appointed who were ready and able to conduct any further settlement discussions. [See also ¶ 8.]

CPC had indeed come to an "understanding" with Messrs. Kohn/Berger "on behalf of Plaintiffs' Class." The CPC attorney, Mr. McInerney, would not provide any information because "his client was in the process of working out a settlement of the government's penalty action in the next two weeks." [¶ 6, A-135.] Similarly, despite Mr. Saveri's reminder to Mr. Kohn of his obligation to "disclose" to the Plaintiff's Committees, Mr. Kohn refused to do so and another of the putative lead counsel told Mr. Saveri that the terms of this

settlement were "none of my business." [¶ 7.]

An Order to Show Cause Re Preliminary Injunction was filed [3/23/82, D-148, A-142], and a hearing was had on that day [D-149, A-143-178]. Mr. Saveri there stated that Messrs. Berger and Kohn were "specifically not authorized to conduct any settlement negotiations . . ." [A-146], and that their settlement negotiations with CPC put the plaintiffs' committee in a "spot," that they could "no longer conduct any meaningful settlement discussions with these other defendants" because of lack of knowledge of what Kohn and Berger had agreed to and what products were involved [A-147].

Judge Meanor, who at that time had not seen Pretrial Order No. 1 [A-149], suggested that once Mr. Saveri found out about the results, he might "like it." [A-148.] Mr. Saveri predicted that if the case was continued to be handled outside of the Plaintiffs' Steering Committee, there would be "dissensions among the ranks, . . ." "One defendant will work one dissident against the

other." Without a knowledge of the terms of the settlement, he would not continue to discuss settlement with two defendants because they "will whipsaw you back and forth." [A-151.] Saveri stated that he had heard that "the call went out and got a sweetheart deal." [A-155.] The benefit to the Kohn/Berger Group of this settlement would be at the time of the fee petitions [A-155].

Judge Meanor mentioned his case load, and stated that "The sooner I can divest myself of this gift I'm going to." [A-156.] He then stated:

THE COURT: Could I make an inane observation?

> You know, the oldest military tactic in the world is dividing and then conquer. It's much easier to fight a 5,000 man army than a 10,1000 man army all at once. I suggest that you people ought to go out and get a Martini or two and get your acts together, because these defendants may be able to split you. If they split you and divide you you're going to be a lot weaker. Both from the point of view of settling and from preparing a trial.

Mr. Berger commented that this case was on "dead center." The district judge admitted blame

and that he was "overworked." [A-157.]

Mr. Sills characterized the acts of Messrs. Kohn and Berger "an act of deceit, upon the part of two of the members of the committee who by themselves" went out and made some kind of a "covert deal, . . ." [A-169.]

The Statement of the Plaintiffs' Discovery Committee [D-152, A-186], while acknowledging the district court's stated objective at the 3/22/82 hearing of "resolution" by "settlement or trial with dispatch" as "desireable," stated that this objective did not justify "settlement negotiations conducted in secret," particularly when there was a lack of the experience of counsel who have had the "benefit of discovery conducted to date."

The Discovery Committee agreed that it was not to the advantage of the plaintiffs or the class to "provide defendants with an opportunity to 'shop around' among individual plaintiff's attorneys for the best settlement terms." They objected to "rewarding" such individual counsel if they were

successful in such "secret negotiations" by giving them leadership positions, "lest there be a temptation to make a 'sweetheart' deal." The "Individual settlement attempts" were stated to "usurp control of the case," and to "violate recognized procedures for the orderly, efficient and expeditious" handling of these types of litigations. Approval of the actions of Kohn/Berger would "undermine" the management of the case and would further "complicate and delay" the litigation. Approval of the "secret settlement negotiations" was characterized as a "dangerous precedent." [A-187.] This memorandum further states that lead counsel and the class representatives as a group did not support the proposed CPC settlement. The importance was stressed of the input of counsel who had conducted discovery as "critical to an evaluation of the adequacy of any proposed settlement." Counsel without this "would not have the information to assess the data provided by a settling defendant." [A-188.]

> (b) Defendants in multiparty actions should not be permitted to induce individual counsel for class plaintiffs into a contest to see who will offer the most favorable settlement terms to the defendant (and therefore the least favorable terms to the class) in return for the privilege (and possible monetary reward) of presenting the initial settlement to the Court. Such a procedure would pit counsel for the class representatives against one another in a scramble to be the first to close a deal with defense counsel. [A-188.]

The feared result was a lack of the "arm's length bargaining" "required" of any settlement under Rule 23. In footnote 3, the Plaintiffs' Discovery Committee continues: "For one court to attempt to obtain quick resolution of a single action by endorsing individual settlement attempts which bypass other class representatives would be catastrophic with respect to class actions generally and inconsistent with the purposes of Rule 23." Permitting unilateral settlement proposals would only, they say, "encourage sweetheart settlements to the detriment of the class . . ." [A-189.]

Release of background information on a

"selective and secret basis" to a minority of plaintiff's counsel meant "the danger of a sweetheart deal is further exascerbated." [A-190.] They then talk of the "burden" on the court of settlements becomming "tactical devices used by dissident plaintiffs for their own perceived advantages." [A-191] "Suspicion" is the word used, a characterization contended "compounded" by the contemporanecus filing of a motion to appoint lead counsel. They suggest an "appearance of impropriety" necessitating an "inquiry" by the Court of a "posible [sic] breach" of "fiduciary" obligations to the class of such a counsel. [A-191.]

The Discovery Committee [A-193] then states: "Successful multidistrict litigation depends in large part upon cooperation and coordination among plaintiffs' counsel." Prior to the "schism" among plaintiffs' counsel, the plaintiffs had previously had great success in obtaining favorable decisions on discovery motions." [A-193 at n.5.] They conclude that CPC should be required to "comply

forthwith with discovery now on file relating to class determination." [A-194.]

Judge Meanor [4/13/82 A-201] wrote Messrs. Walsh and McGoldrick, stating:

> In light of the internecine warfare going on in this case, I would like to make an attempt to settle the entire matter before I am put in a position I should not be forced to be in -- arbitrating a dispute among counsel for the plaintiffs that never should have been given birth.

Judge Meanor "assumes" that he can count on the representatives of each "contingent" to "cooperate" in arranging the conference. Two days later, Mr. Sills wrote Judge Meanor [A-202-203], providing a description of the "prior history of this covert agreement" and requesting that there be "an opportunity" to "develop a record with respect to the proposed settlement." The following day [D-154, A-204-205], a Motion for Settlement Conference was filed by Plaintiffs' Executive Committee "to determine if an overall settlement is possible at this juncture."

In its Order [4/19/82, D-156, A-206-233]

concerning disclosure of the CPC settlement, the district court gave judicial sanction to the Stipulation of Settlement, which then provided for payment of $4,500,000 "upon final approval of this settlement by the District Court." The Stipulation of Settlement defined this approval as entry of a Rule 54(b) motion discharging CPC from all liability, inter alia, under Sections 1 and 2 of the Sherman Act and under 18 U.S.C. 1961, et seq., the Racketeering Influenced and Corrupt Organizations Act. [A-216-218].

On 5/7/82, in a letter to Judge Meanor, John L. McGoldrick [a member of the Berger/Kohn Group] states his "grave concern about developments during the settlement meetings . . ." [A-257-58].

> We are extremely concerned lest the momentum of the modest settlements reached with the smaller defendants carry over to the significant remaining defendants, to wit, A.D.M., Staley, Cargill and Standard Brands.* With respect to these defendants, each of whose share of the $4.5 billion market is in excess of 10% (according to the best information available to all plaintiffs), we do not believe that settlements arrived at on a percentage-of-market-share-bases less than

that employed in the CPC settlements are acceptable.

* We do not regard the Standard Brands proposed settlement as being an acceptable one; the huge disparity between it and the CPC proposed settlement is simply too great. It is, moreover, our understanding that Standard Brands has previously offered more money to Messrs. Kohn and Berger. [Emphasis added.]

In Comments of Settling Plaintiffs to "Plaintiffs" Joint Interrogatories to Defendant CPC International, Inc. and "Plaintiffs" Request for the Production of Documents from CPC International, Inc. filed on 5/7/82 [D-171, A-259-263], the Burger/Konn group characterized the Saveri Group as acting "recklessly and without authority," and characterized objections to a Confidentiality Order as "frivolous."

Several weeks later, [5/21/82, A-266-279], the Berger/Kohn Group filed a Memorandum with Respect to Settlement Negotiations that was not docketed and was not placed in the record. Negotiations between the Berger/Kohn group and Standard Brands had taken place some time prior to revelation of

the CPC settlement [A-266]. The Berger/Kohn Group were "informed" by Standard Brands that they were "interested in a settlement along the same lines as CPC, . . ." [A-268.] and were given a copy of the CPC terms [Settlement for sales between 1976-1979 on the basis of "one percent for sweetners, one-half of one percent for starch and one-quarter of one percent for dextrose."] At that time, the Plaintiffs' Executive Committee had not received a copy of the proposed settlement terms [A-268-270].

According to the sales figures provided by Standard Brands, this would have produced a settlement in the "area of $4 - 4.5 million." There was discussion of that figure before Standard Brands was given the CPC settlement terms [A-270]. Shortly thereafter, Standard Brands told these counsel that "they thought the settlement ought to be in the area of $2 to $2.5 million." A response was made that this was insufficient in view of the CPC settlement, but that if Standard wished to "increase the offer, they should communicate with

us, which they said they would do." These talks were then suspended, and the court was informed of the CPC settlement [A-271].

The memorandum then described the negotiations with Penick & Ford (sales of $150 million). The Berger/Kohn Group indicated to Penick & Ford that set- tlement should be 1% of sales across the board, because of the prior settle- ment and delay. Penick & Ford's initial offer was $500,000, then, a few days later, $750,000, with an indication that while they might pay in excess of that, they would not pay as much as $1 million. Other settlement discussions did not lead to any substantial offer and were termporarily suspended [A-271, 274].

When negotiations resumed before the court on May 5, 1982, "Mr. Saveri announced that a 'settlement' had been reached by him and certain other plaintiffs' counsel with Standard Brands in the amount of $2.09 million." [A-272.] Objection was immediately made by Berger/Kohn that the amount was inadequate and less than previously offered,

and that it would "jeopardize the consummation of the CPC settlement; and would inevitably lead to de-escalation of future settlements." [A-272.]

Even applying the CPC settlement percentage to Standard Brands in the manner suggested by Mr. Saveri would have resulted in a figure of approximately $2.771 million, while in an "across-the-board" approach, Standard Brand would pay $3.4 million [A-273]. Kohn/Berger concluded: "No settlement for less than $2.771 million could have any justifiable or rational support, . . ." "Further, any hope of an acceptable settlement" with other defendants "would be terminated if they saw plaintiffs grasp at $2.09 million from Standard after the CPC settlement." "Finally, to reduce the CPC settlement in order to hold both CPC and Standard as settling defendants would be indefensible." [The CPC settlement was reduced by consent and without a hearing. D-238, A-426.]

According to the Kohn/Berger Group, accepting the Standard Brands' settlement would indicate to

defendants that plaintiffs were "de-escalating rather than escalating from the CPC settlement;" that plaintiffs were "desperate and would accept virtually any settlement; . . ." Their memorandum predicted that every successive settlement would be become a "ceiling rather than floor;" [A-274.]

Coincident with the announcement of the Standard Brands settlement was that the efforts to increase the $750,000 Penick & Ford settlement were "abandoned" and the $750,000 was accepted because Kohn/Berger were afraid it "might be withdrawn." Agreements of settlements were then made with Hubinger for $900,000 and Anheuser-Busch for $650,000. A settlement with National Starch at the court's suggested figure of $300,000 was accepted.

According to the Kohn/Berger memorandum, negotiations were then begun with American Maize Products Co., Inc., with sales around $320 million, more than twice that of Penick & Ford, and estimated to be approximately 8% of the market. [American Maize actually has closer to 12% of the

market.] Despite this substantial market share [half to two-thirds of the market share of CPC, who had agreed to $4.5 million], several plaintiffs stated their intention to agree to $750,000, the same as Penick & Ford. [$800,000 was eventually agreed to. A-276.]

The Berger/Kohn Group contended this meant that that the remaining large defendants, Staley, ADM, and Cargill, would not expect to pay more than a "ceiling figure for $1.5 million for Staley; $1.5 million for ADM and $1.25 million for Cargill." In fact, Staley settled for $950,000, ADM for $500,000, and Cargill for $500,000. Since each successive settlement had been at a "lower rate," their memorandum predicted that CPC would make a "vigorous effort to reduce the amount to be paid by it, so that its payment is comparable to other settlements, or that it [CPC] would withdraw from the settlement completely." [A-276-277.]

The American Maize figure of $750,000 had been rejected and a proposed settlement with Grain

Processing (sales in excess of $200 million) was rejected with a counter of $750,000 ($725,000 was eventually accepted), "although that amount is likewise grossly inadequate when compared to the Penick & Ford identical figure for 50% of the Grain Processing sales."

Their memorandum concludes:

> In view of the fact that the present proponents of a $13 - $14 million settlement were previously arguing that the figure should be at least $200 million, their judgment as to either figure is subject to some question.
>
> The appropriate figure, as indicated by the CPC settlement, is something in excess of $35 million. [A-278.]

The Saveri group, according to Messrs. Kohn and Berger "are not acting in the best interests of the class which counsel are supposed to be representing." [A-279.] Their recommendation, which was also one of the alternatives suggested by objectors, was to "accept the CPC $4.5 million and the small settlements above recommended, giving plaintiffs a total in hand of $7.1 million, with

most of the case still intact against defendants who will be able to satisfy a judgment in excess of $100 million."

The attorneys representing Safeway Stores, et al., were particularly concerned with the contention of the Kohn/Berger group that the Standard Brands settlement was "inadequate, unfair and unreasonable." Their memorandum requesting additional time to evaluate the settlements states:

> Any such unfairness which may exist infected the other settlements as well, for Defendants Anheuser-Busch, Inc., the Hubinger Company, and Penick & Ford, Ltd. have stated that they relied upon the Standard Brands settlement in negotiating the terms of their settlements with plaintiffs. [A-586.]

After the disclosure of the Standard Brand settlement, CPC began its ultimately successful effort to reduce its settlement amount by $700,000 [7/21/82, D-206, 209] In connection with this, there was filed [D-215, A-317-320] "Objections of Certain Plaintiffs to the Preliminary Approval of Certain Settlements and/or Settlement Agreements," in which The Berger/Kohn group contended that the

"amount of the proposed settlement with defendant Standard Brands, Incorporated is grossly inadquate, unfair and unreasonable." [D-215, A-317.] This motion has never formally been heard or resolved.

Also on 8/6/82, "Certain Plaintiffs' Memorandum Contra Defendant CPC's Motion to Reform Settlement Agreement" was sent out, but apparently not filed [A-321-329]. The goal of CPC's motion to reform its settlement agreement is described by Berger/Kohn as "reducing the settlement fund to be paid by CPC by $702,000 from $4,500,000 to $3,798,000, a reduction of 15.6% of the amount set forth in the signed settlement agreement." This motion was motivated by the more favorable terms of the Standard Brands settlement. The "reality", according to Berger/Kohn, may well be not that CPC paid too much but that Standard Brands paid "<u>too little in settlement</u>, . . ." [Emphasis in the original, A-322.]

Kohn/Berger state that the only other proposed settlement with a defendant comparable to CPC is

with Standard Brands, and that [A-323]:

> (b) The proposed Standard Brands settlement was negotiated by attorneys other than those who negotiated the CPC settlement; (c) the plaintiffs' attorneys who negotiated the CPC settlement are opposing the proposed Standard Brands settlement as being inadequate.

The allegations made by CPC in its 8/20/82 Brief in support of application to reform the CPC Stipulation of settlement [Reply Memorandum, D-288, A-343-348] seem inconsistent with contentions made by plaintiffs' counsel. According to CPC, immediately after the CPC settlement became known, proposed settlements were reached with "at least six of the other eleven defendants. Those settlements were reached with a different group of plaintiffs' lawyers than the group which settled with CPC." [A-344.] CPC concludes that all of the settlements are "relatively more favorable" than that of CPC [A-344]. The Standard Brands settlement is "clearly more favorable than CPC's." [Id.]

The Kohn/Berger Group responded on 8/30/82 [D-220, A-349-350], stating "CPC entered into the

first settlement in this case. As we have repeatedly submitted, that settlement is fair, reasonable and adequate and should be approved." However, "We believe and continued to believe that the only reasonable resolution in the best interests of the class is for Your Honor to disapprove the Standard Brands proposed settlement." They state that the alternative would be to "conclude the pretrial discovery and proceed to trial against Standard Brands and any other non-settling defendants." [A-350.]

On 2/23/83, CPC sent the court an ex parte cover letter, a "Supplemental Motion to Reform Stiplulation of Settlement," and an affidavit of its counsel [A-366-394]. These pleadings were not docketed and are absent from the record. The motion requested reduction of the CPC settlement amount "by at least $702,000 and further reduced to provide for payment by CPC of an amount comparable to the settlement amounts to be paid by Standard Brands, Inc., and/or A.E. Staley Manufacturing

Company." Denis McInerney, counsel for CPC, filed an affidavit, which [A-369] compares the proposed settlement with Staley of "$950,000, or 21% of CPC's $4.5 million settlement, although Staley's estimated sales of comparable products are 121% of CPC's sales."

At ¶ 6 [A-371], Mr. McInerney described the "disagreement" from almost the "inception" of the private class actions between the Kohn/Berger group and the Saveri group. "Prior to any settlement negotiations with CPC, that schism had become so great that the Kohn-Berger group determined to move to be designated lead counsel for the class, . . ." At ¶ 7, he confirms the Kohn/Berger settlement formula. At ¶ 9, he denies that there were any changed circumstances because of the later formal order of dismissal of the government civil penalty action.

At ¶ 10 [A-374], Mr. McInerney described the negotiation efforts of the Saveri group after disclosure of the CPC settlement:

> At that point, apparently in an effort to maintain their position in the case, the Saveri group was willing to enter into settlements at much smaller amounts that the CPC settlement contemplated. Over the following months, a number of settlements were proposed at progressively lower amounts both in absolute terms and as a percentage of sales. No rationale for the pattern of settlements that developed has ever been articulated, nor does there appear to be any beyond the happenstance of timing and which group of plaintiffs' counsel dealt with the settling party.

At ¶ 13, he notes that the Kohn/Berger "objections to Standard Brands' settlement (which was not negotiated by them, but by a group of plaintiffs' counsel headed by Mr. Saveri) are still pending." [A-376.] Staley and other defendant proposed settlements, "negotiated with the Saveri group,. . . are even further out of line with CPC's settlement."

Mr. McInerney described the influence of Judge Meanor, who was actively involved in the settlement negotiations [¶ 15, A-377]. "From time to time, we were advised by Judge Meanor of the 'progress' of these negotiations." Judge Meanor preferred

comparisons not based on the CPC "formula" approached but on settlement figures as a percentage of all sales, which are "less favorable to CPC (the largest producer of dextrose), . . ."

In ¶ 16 [A-377], Mr. McInerney states that on January 16, 1983, Judge Meanor advised him that Cargill and ADM had each agreed to settle for $500,000. On the basis of CPC's best estimate of their sales of $513 million and $614 million respectively, the settlement rates were ".10% (Cargill) or .08% of sales (ADM) -- respectively 1/6 or 1/7 of the across-the-board rate of CPC's settlement. <u>There is no objective basis upon which such a disparity could be justified.</u>" [Emphasis added.]

> 17. At the same conference, Judge Meanor told us that the Saveri group had negotiated a proposed settlement with Staley (which up till then had held out) in the amount of $950,000. (That amount is only 21% of the CPC settlement, although Staley's sales are considerably larger than CPC's.) After some discussion, Judge Meanor inquired what adjustment in the CPC settlement would be appropriate in my opinion. I said that I could not respond without consulting CPC,

> just as I had been unable to respond earlier that same day when David Berger had proposed to modify the CPC settlement by an agreement to reduce the settlement amount by $700,000. Judge Meanor stated he thougnt that a $700,000 reduction would be agreeable to all concerned if CPC and Mr. Berger would agree to it and that he would endorse it. He asked for a response from CPC as soon as possible, since he expected to leave the bench shortly. [A-377-378.]

After getting authority, Mr. McInerney was again assured of the continuing agreement of all concerned, but when the effectuating papers were presented to Judge Meanor, he did not sign them because counsel for Standard Brands then contended that their settlement should be reduced by $300,000. CPC characterized the Staley settlement as one in which Staley would be paying an average of only .11 of 1% of its sales, whereas CPC would be paying .61% of comparable sales, more than five time that amount.

Mr. McInerney contended that the "Court in a class action must be satisfied as to the fairness of the settlement of each individual defendant bearing in mind the interests of the class." citing

Corrugated Container, 643 F.2d 195 (5th Cir. 1981) The distinctions between defendants must be justified. His Settlement Comparison Chart indicates that the total settlement should be vastly in excess of the actual $12,750,000 settlements. These documents were not docketed, were not in the record, and were not available to petitioners until after approval of the settlement.

When the motion and the supporting papers were filed, Judge Debevoise, then newly assigned to the case, wrote on 3/15/83 [A-395], stating that he is "deferring the hearing for the time being until I have had an opportunity to familiarize myself with the case . . ." [A-395.] The same day, he wrote John McGoldrick [A-396, requesting separate conferences with representatives of plaintiffs and defendants. "The purpose of the conferences will simply be to seek to move along with discussions of settlement or if a settlement seems beyond reach at this time to set a schedule for discovery and trial."

Standard Brands contended that there was no disparity between its settlement and that of CPC, because its settlement funds was earning interest and "CPC's is not." If CPC's settlement were reduced by $700,000, a 15.5% reduction in the Standard Brands' settlement amount or $325,000 should be ordered, according to Standard Brands, Moreover, Standard Brands disagreed with the position of CPC that a further reduction was appropriate "because certain other defendants have subsequently settled on more favorable terms." [Example of Staley, A-404].

In its 3/28/83 Memorandum in Opposition to Application to Reform CPC Stipulation of Settlement, the Saveri group disagreed with the contention of CPC that there was "a dispute among plaintiffs' counsel which caused one group of counsel to seek low settlements to preserve 'their position in the case.'" [A-407.] They admit that the Standard Brands' settlement was negotiated by the Saveri group. A statement is made that other

settlements were negotiated jointly by the two groups in conjunction with Judge Meanor [A-408].

The "effort" of the McInerney affidavit "to impute improper motives to plaintiffs' counsel" was termed "distasteful" and "disserves this Court . . ." [A-409.] As to the contention of the McInerney affidavit that there is "No rationale for the pattern of settlement . . . [¶ 10].", the Saveri group states: [A-409]

> There is a pattern to the settlements. It will be articulated at the appropriate time when motions are made for entry of any order approving their adequacy.

On April 6, 1983, John A.Cochrane, a member of the Plaintiffs' Executive Committee filed a "Motion to Reject Proferred Settlements" [D-235, A-420], stating, inter alia: "A high degree of judicial scrutiny is required when one of the architects of the CPC settlement characterized it as 'McInerney [CPC] got a low bargain-basement settlement without any merit discovery.'"

On 4/13/83, a Stipulation of Reduction in

Present Value of CPC Settlement [D-238, A-426-428] was filed, stating, inter alia, the following:

> CPC will cause to be paid . . . the sum of $4,500,000 . . . 18 months after final approval of this settlement by the District Court . . . [$700,000 in interest]
>
> 2. CPC's Motion to Modify the Stipulation of Settlement, filed July 16, 1982, and CPC's Supplemental Motion to Modify the Stipulation of Settlement, filed February 23, 1983, are hereby withdrawn.

At the hearing on whether the class should be notified, the court noted that the the settlement was in a "state of flux" due to CPC seeking a revision of its terms of its settlement. The apparent resolution by agreement between CPC and the various majority plaintiffs, "puts other settlements in a state of flux as others seek similar, or what they perceive to be similar accomodations to the accomodations which CPC achieved." [D-244, A-431.]

In his opposition, Mr. Cochrane contended that $40 million would be the minimum adequate settlement [A-445], and that "If the reformations

are downward, then, of course, it's 700,000 plus the downward reformation of all, and we don't have 13 million, we have something less than that."

"The question," at that time, according to the district court, was "whether I'm going to get educated more adequately at this point or whether the real data will become available if notice goes out, you are put to either defend or attack the proposed settlement." [A-451.]

The Opinion of 4/21/83 [D-240, A-475-482, Appendix B] reviewed the history of discovery in Dimmitt and the FTC and Grand Jury documents of CPC and Penick & Ford [A-476]. The court reviewed the contentions of Pan-O-Gold:

> They note that at the outset of the litigation there were two groups of plaintiffs' attorneys vying for position as lead counsel, that one group effected a settlement with CPC and that the other group was then pressured by this development to enter into improvident settlements with other defendants. [A-477.]

The opinion states that the first two settlements had been negotiated by competing groups

of attorneys [contrast a later contrary statement at A-839]. He concludes though [A-479]:

> I am not persuaded that the opinions expressed by various plaintiffs' attorneys in the past reflect their views now. A number of developments have taken place since the time the original views were expressed and the context is very different.

Using the settlement of the civil penalty action, formally made June 7, 1982, as a "development" is contrary to the affidavit CPC's counsel that the disposition of the civil penalty action was known in February of 1982, prior to first discussions with Messrs. Kohn/Berger [A-372].

The district court acknowledged disparities between the settlements: [A-840, Appendix C]

> It's clear that no single logical thread runs thorugh the amount which each defendant ultimately agreed to pay. For example, it cannot be said that each defendant has agreed to pay a certain percent of its sales of any given product; nor can it be said that the degree of risk of liability of each defendant was calculated and factored into the process.

The court did, however, conclude that the settlements were the maximum amount that could be "extracted." Later, he continued [A-849]:

> The objector characterizes the individual settlement payments as anomalous, which they may well be when one compares the market shares of various defendants and the shares of the total settlement which they are contibuting. In fact, however, the settlements did not purport to be based on market shares. . . . I believe that they [plaintiffs] obtained in the aggregate as much as they could, and the question is not whether each individual payment fits into some tidy rationalization. Rather the question is whether the aggregate sum is adequate under the circumstances.

THE DIMMITT CASE

Dimmitt Agri. Business Inds., Inc. v. CPC International, 679 F.2d 516, rehearing denied (5th Cir. 1982), cert. denied, ___ U.S. ___ (1983) involved a suit against most of the same defendants as are involved in the present litigation, all of whom settled but CPC. A jury verdict of monopolization and a sizeable damage award was obtained in the district court against CPC but was reversed on appeal. The Fifth Circuit Court of Appeals referred to the history of antitrust violations of the corn derivative industry, internal memoranda of CPC discovered in the 1915

government case, and more recent but nearly identical internal memoranda of CPC discovered by counsel for Dimmitt that are no less than "smoking guns," that did not appear in the CPC material inspected by plaintiffs and objectors, and which are absent in this case.

All counsel who participated in the Dimmitt case or who were assigned by the Plaintiffs' Steering Committee to review the Dimmitt case and record have raised questions, opted out, or oppose the settlements. This is true as to Messrs. Cooper and Cochrane [A-630], the latter of which Mr. Saveri knew spent a "lot of time" in reviewing the record and revi wing the documents [See also A-850, A-760], and as to the Alioto firm [A-727-28].

On 4/1/82, Lawrence John Appel [D-151, A-179-184], a member of the Alioto firm, then prosecuting the Dimmitt case and other cases against CPC, filed an affidavit. In Dimmitt, Staley, Penick & Ford, National Starch, Cargill, Hubinger, Grain Processors, Corn Sweetners, and

American Maize were also defendants in a price fixing claim. Mr. Appel described the "vigorous discovery" and the subsequent motion for summary judgment of CPC and Cargill, which was defeated, in part because of the discovery efforts, including his gathering and collation of thousands of documents useful to this case.

Mr. Appel contended that the exclusion by Kohn/Berger of the Alioto firm from the CPC settlement negotiations caused the loss of input of attorneys who probably had the most "extensive familiarity with the facts pertinent to the industry" herein involved, together with "the nature and description of evidence pertinent to price fixing charges made; and the individual representatives of defendants who are responsbile for the price fixing and other programs which are alleged to have caused injury to the plaintiffs." [A-182-183.]

The Memorandum of Douglas Rigler Re: Fifth Circuit Remand in Dimmitt v. CPC International

[January 22, 1982. A-312-313] states:

> As some of you may know, the Fifth Circuit reversed the jury verdict holding CPC liable for monopolization in the corn syrup and corn starch industries and remanded for a new trial. The opinion appears very helpful in the context of our Section 1 case. First, the court summarizes some of the evidence of intent to monopolize and quotes at length from various CPC internal memoranda. The court concludes not that CPC did not act with intent to monopolize, but that it lacked the relevant market share to support a finding of monopolization.
>
> Even more important from the point of view of the class plaintiffs is the holding on page 3271 that "Dimmitt's structural evidence is consistent with the proposition that the corn wet milling industry is only an oligopoly, with CPC as its price leader. If so, CPC's market power is dependent upon joint action by at least some of its rivals." [Emphasis in the original.]

In D-221, the transcript of hearing on reconsideration of Rule 11 motion of 8/6/82 [A-330-340], there was a discussion concerning the Dimmitt case in which Mr. Kurland, for plaintiffs, characterized the Fifth Circuit opinion as indicating that "there could well have been collusive activity in this very business in which the defendant ADM is involved, and in which Cargill

is involved. And, if anything, the case increased in what we think are the merits of its and there's no secret we intend to make these people defendants in our proposed unified additional complaint." [A-331.] Mr. Saveri stated:

> I think the record should reflect the fact that the Dimmitt case, although it was reversed by the Fifth Circuit, was remanded for retrial in which the Fifth Circuit indicate that there really was, should have been a guilty verdict, or rather a verdict on the attempt to monopolize, and the Fifth Circuit wrote a stinging, a really stinging opinion of this while industry, and particularly for CPC. [A-337-338.]

Counsel for Stokely-Van Camp, Mr. Holman, discussed Dimmitt at the 6/30/83 hearing [A-613]:

> We understand that Cargill, Staley and Standard Brands told CPC to leave the prices up. We understand they talked about it for 45 minutes while CPC said "We shouldn't be talking about fixing prices." But for 45 minutes they talked. CPC's president, Eisner, admitted this, we are told in the Dimmitt depositions and in the Dimmitt trial. [Contrast the conclusion of the district court (A-816) that the meeting "turned out to be fairly innocuous when you read the whole transcript." and that Eisner's response was that he did not wish to discuss price leading and that he was leaving the meeting (A-853).]

> In September or October, '72, defendants found out that Dimmitt was going out of business. . . . But CPC documents say that CPC will go up in price and others will follow.
>
> Now we think there is a liklihood here of a showing there was a simultaneous agreement to go up in price. But even if that is not shown, there is acceptance of an agreement to join a price increase plan. That is plainly illegal. The amounts involved are enormous.
>
> Eisner said, we understand, that CPC will go up but not so high as to make ivestment attractive for others in new plants. But there was a ten dollar increase in price in just two years.

At 8/2//73 hearing, objectors stated:

> It is strange and unfair that the people that the Dimmitt material points the finger at most clearly have almost escaped with no money at all. I just think that's very strange, and doesn't seem fair. The people against whom the plaintiffs had the best case, CPC, ADM, Staley, and Cargill, have the lowest percentages compared to the market share. Why not approve the other settlements and let the litigation go against these three? [A-827.]

He continued: "there is a protective order in Texas that has never been upset," and that there were thousands of documents available in Dimmitt

that apparently have never been reviewed. [A-815.]

THE GOVERNMENT PROCEEDINGS

The allegations of second civil penalty action were substantially the same as the initial one, except that violations were alleged at least through 1976 [A-838]. The case was settled by a consent order [A-839].

The civil penalty action was "not dismissed by the government, nor were the charges dropped as to Staley." Rather, by the terms of the Consent Order, Staley is "specifically prohibited from engaging in certain conduct." They were not cleared of wrongdoing and not dismissed from the Government action. Cargill and ADM, the other moving parties, were not parties to the Government action [A-306-307].

In the Memorandum Opinion denying motion for reconsideration of order of 2/5/82 [D-223, A-358-364], Judge Meanor stated:

> Although there were no civil penalties imposed, the Final Judgment on consent, approved by Judge Schnacke on June 7, 1982,

> enjoins defendants from engaging in a broad range of prohibited conduct. The government did not effect an unconditional dismissal of the California actions as it has done on other occasions. There are a myriad of possible explanations for the government's decision not to pursue monetary penalties; the court cannot speculate in this regard.

Judge Meanor concluded that the actions were "separate and independent," and that alleged violations of the FTC Act and those of the Sherman Act require "different" "proofs." "The disposition of the California actions is simply not determinative of any lack of merit to this case."

> Defendants may appropriately challenge the supportive grounds for plaintiffs' complaints in a motion for summary judgment after adequate opportunity for discovery. [A-364.]

Judge Debevoise stated that "Government action suggests a sharp increase in the magnitude of risk of proceeding to trial . . .," and

> it suggests not only no criminal liability but also no civil liability for violation of the 1950 cease and desist order which enjoins the very conduct that forms the basis of the class action complaints. Assuming arguendo that liability could be established as to damages, the Government action strongly suggests a damage period ending in 1976.

[A-852-853, Appendix C, Emphasis added.]

THE STATUTE OF LIMITATIONS AND DAMAGES

A. Antitrust Limitations and Its Exceptions

The private civil actions were instituted in December of 1979 and allege a conspiracy through 1979. The revised government actions allege that the violations of the defendants continued "at least" through 1976 [compare A-838 with A-850]. As is stated by the Judge Debevoise in his opinion:

> If the Justice Department allegations are correct, the applicable four-year statute of limitations would, without proof of fraudulent concealment, limit plaintiffs' claims to approximately a one year-period from mid-December, 1975 (4 years prior to plaintiffs' initial filing) through 1976. [A-850-851, emphasis added.]

The attorneys for Stokley-Van Camp [A-700-701] stated: "We are having trouble in the time constraints that have been put on us, even dealing with the CPC and Penick and Ford documents." Although the work had been divided, these attorneys could not begin to find the "interrelation of one document to the other."

MR. HOLMAN: We have evidence of meetings. We have evidence from expense reports that there may have been other meetings.

We have evidence that there was a mechanism in place through a broker that gave almost immediate promulgation to all of the defendants of price information.

Is that enough to mount the kind of lawsuit that is involved here? Or should we stay in the class?

We need to see what the other company's documents say about these meetings. We also need time to evaluate the interrelation of the documents.

We find that CPC embarked on a very sudden and extensive antitrust compliance program in house. We would like to know, with the time of that related to something that was done, that's revealed by the other company's documents.

Were there luncheon meetings or dinner meetings that provoked the counsel of management to embark on a program like that?

THE COURT: What was the date of -- when that started? What date did this compliance meeting --

MR. HOLMAN: Late '75, intensely in '76, more in '78 and '79.

It is very troublesome what we find, but we can't assess it enough to embark on the dimension of the course.

Discussion of the statute of limitations and the evidence to support fraudulent concealment is contained in A-753-759.

B. Damages Suffered

Prior to the incriminating CPC, Staley, Cargill, and ADM meeting and thereafter, CPC was and continued to be the price leader [Dimmitt Brief, at 25-26, A-760-761], Dimmitt's counsel [Id. at 30-32, A-762-764] discussed how from November of 1972 through 1975, the prices continued to rise under circumstances in which CPC went from a $622,000 loss at the gross profit level at a sale price of $3.40 per hundred weight to a gross profit of $7.7 million in 1973 [$5.35/cwt. and then $7.25/cwt.] and $10.4 million in 1974 [$7.98/cwt.] The gross profit per hundred weight rose to $1.51

on an average net selling price of $9.06 for a gross profit percentage of 16.66% in 1974. The 1975 forecast was for a selling price of $9.89 per hundred weight and a gross margin of $3.32/cwt for a gross margin percentage of 33.56%, all as a result of the conspiratorial rise in prices.

As may be seen from Objectors' Chart, "Total Sales of Defendants During 1976 of Selected Products" [A-766], total sales for that year were $1.16 billion dollars. Assuming a modest 10% inflation of the market price, this would mean that defendants overcharged plaintiffs and the class members by amounts in excess of $116,301,550.00 per year before trebling.

Despite evidence in the record supporting a recovery in excess of $116 million per year, plaintiffs and defendants provided no economic data or damage studies, even though requested by objectors [A-608, 610, 671]. Mr. Holman [A-615], attorney for Stokley-Van Camp, stated:

If we want to cover over quickly the

problem with a miniscule settlement, we can.

> If we want to get to what kind of activity there was, what kind of inquiry there was about that activity, how much there was in the way of damages, how they were calculated, we have to also know how the settlement was negotiated. . . . But we do have to know something about how the settlement sum was reached beyond just that it was reached.

Later in the hearing, he reported that Mr. Kohn refused to tell him "something about their damage analysis." [A-639]